LOCAL GOVERNMENT LAW

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Chapter 18

LOCAL CONTROL OF THE USE OF PROPERTY: ZONING AND RELATED METHODS

Analysis

§ 18.1 Private and Public Nuisance

Control over, and planning of, the uses made of land within a community are among the chief functions of local government. Prior to the twentieth century, the tort action of nuisance had already developed as one means of land-use control; and this remedy for bothersome uses of property still exists. A private nuisance action will lie where defendant's unreasonable use of his property interferes, unreasonably and substantially, with the reasonable use and enjoyment of plaintiff's real property, as where lights, noise, dust, etc. from defendant's premises disturb plaintiff's dwelling or business. The possible remedies include monetary damages and/or an injunction against the continuance of the nuisance.[1] Public nuisance has a dual life: *Criminal* liability is possible, since by definition this type of nuisance involves violation of some criminal statute. And public authorities may take action to have the public nuisance abated or enjoined. But without regard to whether or not public officials have acted, a private individual may seek a *tort* remedy for public nuisance if that individual can show violation of a criminal statute, an interference with a "public right" (or, as some modern cases say, with the "general public"—or at least with "a considerable number of people"), and some special injury to

[1] See Prosser & Keeton, Law of Torts 637–43 (5th ed. 1984). See generally 1 Antieau, Municipal Corporation Law §§ 6.–04–.20 (1998). Cities with constitutional home rule are granted powers by the state constitutions to define and abate public nuisances, while other municipalities frequently have such power under state statutes. See Antieau, *supra*, §§ 6.08–.09. When a city legislative body declares certain activities or structures nuisances, the courts normally accept that declaration unless it is clearly arbitrary or unreasonable. See Horbach v. Butler, 135 Neb. 394, 281 N.W. 804 (1938) (city council finding is conclusive unless power abused); Boden v. City of Milwaukee, 8 Wis.2d 318, 99 N.W.2d 156 (1959). And where the state gives localities power over nuisances, this usually includes the power to abate, as by demolition, a nuisance—if adequate notice, and opportunity to rectify the condition, are given the owner. See Antieau, *supra*, §§ 6.13–.20. On enjoining *threatened* nuisances, see Annots., Right to Enjoin Threatened or Anticipated Nuisances, 55 A.L.R. 880 (1928); 32 A.L.R. 724 (1924); 26 A.L.R. 937 (1923); 7 A.L.R. 749 (1920).

plaintiff, differing in kind (not just in degree) from the injury to the public.[2] Again, the chief remedies are damages and/or an injunction.[3]

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[2] See Reynolds, Public Nuisance: A Crime in Tort Law, 31 Okl.L.Rev. 318 (1978). Also sometimes included as elements of the tort action are a substantial interference with plaintiff (not necessarily with plaintiff's use of his real property) and some basis of liability: intent, negligence, or strict liability (such as for an abnormally dangerous activity). See *id.* at 337–42. See generally Prosser, Private Action for Public Nuisance, 52 Va.L.Rev. 997 (1966). The differences between public and private nuisance are well summarized in Comment, "Feed the Hungry, but Not on Our Block,"—Armory Park Neighborhood Association v. Episcopal Community Services in Arizona, 28 Ariz. L. Rev. 121, 123 (1986). Cf. People ex rel. Gallo v. Acuna, 14 Cal.4th 1090, 60 Cal.Rptr.2d 277, 929 P.2d 596 (1997) ("community aspect" of public nuisance said to distinguish it from its cousin private nuisance; court upholds preliminary injunction against alleged criminal street gang members appearing in public with any other gang member). Compare George v. Newfoundland & Labrador, 2016 N.L.C.A 24 (2016) (Canadian provinces not liable for public nuisance due to proximity of moose in plaintiff's vicinity as there was no unreasonable interference with public's access to highways). See generally Antolini, Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 Ecology L.Q. 755 (2001). See also the classic article on nuisance by Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972), discussed in Godsil, Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism, 53 Emory L.J. 1807, 1810–11 (2004). As to the differences between nuisance tort claims and trespass tort claims, see Anderson, Subsurface "Trespass": A Man's Subsurface Is Not His Castle, 49 Washburn L.J. 247 (2010), noting, at 248, that nuisance law has the desirable flexibility to resolve many land-use cases but that "when one intentionally injects a substance" into a neighbor's property, "money damages should be recoverable for any actual and substantial damage caused without having to engage in the uncertainty of balancing whether the gravity of harm to the landowner outweighs the utility of the defendant's conduct," as is often done in private nuisance law, and that trespass may thus be a more appropriate remedy.

In the *tort* action for *private* nuisance, it is sometimes emphasized that there must be either evidence of physical injury to property or of interference with use and enjoyment of property. See Smith v. Kansas Gas Service Co., 285 Kan. 33, 169 P.3d 1052 (2007) (to maintain tort action for nuisance, plaintiff must establish an interference with owner's use and enjoyment of the property which is separate and distinct from claim that property's value has diminished because of marketplace fear or stigma).

There is a trend toward eliminating from public nuisance the traditional requirement of violation of some criminal (*i.e.*, penal) law. Restatement (Second) of Torts § 821B (1977) lists violation of a criminal law as merely one of several factors to be assessed in determining the unreasonableness of the conduct that is a requisite for liability, and the defendant need not be found criminally responsible. *Id.* & Comment d, at 89 (1977). See Armory Park Neighborhood Ass'n v. Episcopal Community Services, 148 Ariz. 1, 712 P.2d 914 (1985) (regardless of presence of criminal statute, liability for public nuisance depends on whether conduct is unreasonable; plaintiff's complaint, seeking injunction, should not be dismissed merely for failure to allege criminal violation). Compare Lange v. Minton, 303 Or. 484, 738 P.2d 576 (1987) (ordinance declaring it a public nuisance to keep an animal found running at large held to imply some element of fault—knowledge, consent, willingness, or negligence—on part of animal's keeper).

[3] See Prosser & Keeton, *supra* note 1, at 643–52. Public nuisance statutes generally give government officials broad powers to shut down public nuisances even if private individuals have not filed criminal complaints or tort actions. See Mackey v. State ex rel. Harris, 495 P.2d 105 (Okl.1972). On the use of nuisance closure laws to abate a First Amendment use of property, see Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986), on remand 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492 (1986) (adult bookstore could be closed for one year due to illicit sexual activities on the premises). On a government's power to abate a public nuisance without committing a compensable "taking" of property, see Bearden v. City of Tulsa, 821 P.2d 394 (Okl. App. 1991) (where removal of property was in connection with abatement of public nuisance, no inverse condemnational taking found). See generally on the validity of forfeitures to the government Bennis v. Michigan, 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996), upholding forfeiture of property used in connection with criminal activity and finding it not a compensable taking. But see Fraley, The Uncompensated Takings of Nuisance Law, 62 Villanova L. Rev. 651 (2017). Compare Gold Vein Limited Liability Co. v. City of Cripple Creek, 973 P.2d 1286 (Colo.App. 1999) (city had authority to provide for abatement of public nuisance caused by dangerous buildings and to impose lien on property for sums expended). On attempts to expand public nuisance law, see Schwartz, Goldberg, and Schaecher, Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law, 62 Okla. L. Rev. 629 (2010); Schwartz and Goldberg, The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort, 45 Washburn L. J. 541 (2006). On the effect of governmental authorization on public nuisance status, see State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque, 119 N.M. 150, 889 P.2d 185 (N.M. 1994) (if a public works project, such as a bridge, is in existence and poses a present nuisance, due authorization is a qualified defense; but if project has yet to be completed and is challenged as an anticipatory nuisance, due authorization is complete defense). On the process for

But nuisance has obvious limitations as a land-use control device: The private nuisance action depends entirely on the initiative of private citizens; and the public nuisance also will, as a practical matter, often not be curtailed unless action is taken, or at least complaint made, by some private individual. The very existence of a private nuisance depends on a balancing of the rights of the persons involved; and relief of an injunctive nature, particularly as to private nuisance, always involves a further "balancing of the equities" to determine whether this extreme remedy is justified.[4] In

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administering public nuisance law, see generally Note, No Better Instrument: The Necessity of Notice and an Opportunity to Be Heard and the Deficiencies of Nuisance Abatement Law in New York City, 37 Cardozo L. Rev. 1093 (2016). Comment, Due Process and Local Administrative Hearings Regulating Public Nuisances: Analysis and Reform, 43 St. Mary's L.J. 619 (2012).

[4] See, for instance, the cases cited in Annot., Children's Playground as Nuisance, 32 A.L.R.3d 1127 (1970), many of which consider such factors as the amount of annoyance to neighboring property-owners from noise, dust, lights, etc. Courts have usually held or indicated that a total enjoining of a children's playground is unlikely to be granted; but an injunction may occasionally be drawn so as to eliminate or mitigate the particular annoyances of which complaint is made. See Kasala v. Kalispell Pee Wee Baseball League, 151 Mont. 109, 439 P.2d 65 (1968); Lieberman v. Saddle River, 37 N.J.Super. 62, 116 A.2d 809 (1955). On "balancing the equities" in nuisance cases, see generally Prosser & Keeton, note 1, at 630–32. Nuisance claims based solely on aesthetics are generally not actionable. See Lauenstein v. Bode Tower, 392 P.3d 706 (Okla. 2016) (cellular tower not actionable nuisance to adjacent property owners where claim was based solely on dissatisfaction with appearance). See also Section 18.4, note 81, para. 3. On developing areas in which private nuisances might be found, see *e.g.*, Sowers v. Forest Hills Subdivision, 294 P.3d 427 (Nev. 2013) (residential wood turbine may be or become a nuisance due to improper or negligent manner in which it is conducted or due to its location); Alden, Declaring Solar Access Interference a Private Nuisance, 10 Temple Envtl. L. & Tech. J. 93 (1991); Judd, What Was Old Is New Again: Recent Developments in Judicial Review of Land Use Regulation of Cellular Telecommunication Facilities, 46 Urban Law. 865 (2014); Note, The Role of Nuisance in the Developing Common Law of Hydraulic Fracturing, 41 Boston Coll. Envtl. Aff. L. Rev. 265 (2014); Note, Shattered Nerves: Addressing Induced Seismicity Through the Law of Nuisance, 46 Envtl. L. Rep. News & Analysis 10326 (2016); Annot., Computer as a Nuisance, 45 A.L.R. 4th 1212 (1986).

On the uses of nuisance law nowadays as a land-control tool, see Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls, 40 U.Chi. L.Rev. 681, 719–24 (1973). On regulating the keeping of animals within municipal limits, and the use of municipal power to define and abate public nuisances as a means of exercising such power, see C.J.S. Municipal Corporations §§ 212–13 (1949). Cf. *Id.* § 214 (on use of police power to prevent animals from running at large), § 215 (on control over, and removal of, dead animals), § 216 (suppression of diseases of animals), § 217 (preventing cruelty to animals), § 218 (regulating possession of dogs), and § 219 (regulating the slaughtering of animals). Cf. Barnes v. Board of Adjustment of Bartlesville, 987 P.2d 430 (Okl.Civ.App. 1999) (Vietnamese pot-bellied pig found to be nuisance). A municipality may impose special restrictions on the ownership of pit bull dogs. See State v. Peters, 534 So.2d 760 (Fla.App.1988) (owners must maintain insurance or have other proof of financial responsibility). Under express power from the state, municipalities may even regulate the keeping and treatment of animals within a specified distance outside municipal boundaries. See State v. Rice, 158 N.C. 635, 74 S.E. 582 (1912) (within a quarter mile). On the use of public nuisance law to *protect* animals, see O'Keefe, Using Public Nuisance Law to Protect Wildlife, 6 Buffalo Envtl. L.J. 85 (1998). Cf. Hood River County v. Mazzara, 193 Or.App. 272, 89 P.3d 1195 (2004) (statute granting immunity to farmers in certain nuisance cases applied where dog that was guarding sheep barked for six hours; evidence indicated that dogs would protect herd by barking at predator, and thus dog's owner was following a legitimate and recommended farming practice). See also Klass, Bees, Trees, Preemption, and Nuisance: A New Path to Resolving Pesticide Land Use Disputes, 32 Ecology L.Q. 763 (2005). As to bees in particular, see Note, Backyard Beekeeping in the Beehive State: Salt Lake City's Beekeeping Regulations, Nuisance Concerns, and the Legal Status of Honey Bees, 2018 Utah L. Rev. 237. Compare Note, To Bee or Not to Bee: RoboBees and the Issues They Present for United States Law and Policy, 2016 U. Ill. J. L. Tech. & Pol'y 161. See generally Annot., Liability for Injury for Injury or Damage Caused by Bees, 86 A.L.R. 3d 829 (1978) (liability generally imposed only for negligence, not strict liability); Dobbs, The Law of Torts 949 & note 22 (West Publ. 2000). As to nuisance liability for wind farms and other wind energy projects, see Comment, Headwinds to a Clean Energy Future: Nuisance Suits Against Wind Energy Projects in the United States, 97 Cal. L. Rev. 1337 (2009); Comment, Social and Regulatory Control of Wind Energy—An Empirical Survey of Texas and Kansas, 4 Tex. J. Oil, Gas & Energy L. 89 (2008–09); Comment, A Don Quixote Tale of Modern Renewable Energy: Counties and Municipalities Fight to Ban Commercial Wind Power Across the United States, 79 UMKC L. Rev. 717 (2011). As to climate-change litigation, see generally Comment, Preserving Legal Avenues for Climate Justice in Florida Post-*American Electric Power*, 64 U. Fla. L. Rev. 295 (2012), discussing American Elec. Power Co. v. Connecticut (AEP), 564 U.S. 410, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011), which held that the Federal Clean Air Act and the regulatory actions it authorizes

one celebrated modern case, the developer of a retirement community obtained an injunction against continuance of a cattle feedlot (which had been in existence before the retirement community)—but the injunction was conditioned on the plaintiff's indemnifying defendant-feedlot for the reasonable cost of moving or shutting-down the operation.[5] Finally, nuisance is at best a piecemeal remedy to particular problems, not a method by which comprehensive planning of land uses can be achieved.

§ 18.2 Zoning—Pre-1926 Development

Some device for controlling land uses on a comprehensive, planned, area-wide basis was needed; and the answer developed for this need was zoning: an exercise of the police power by which the nature and extent of the use of land is regulated—and sometimes also the architectural and structural requirements for buildings erected on the land.[6] The development of zoning laws and their varied forms and application are the subjects of a rich literature.[7] While some laws limiting the types of buildings that could be erected

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displace any *federal* common-law right to seek abatement of fired power plants, thus foreclosing the use of federal common-law rights of action in climate-change litigation but leaving unanswered whether the Clean Air Act also displaces *state* common-law tort actions. This suggests that state-based public nuisance could play a part in future climate-change litigation. See *id.* at 2537. But the Court indicates a preference for confining climate-change litigation to agency- and regulatory-focused actions, as opposed to common-law tort actions. *Id.* at 2540.

[5] Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972), noted 26 Vand.L.Rev. 193 (1973). See Comment, Indemnification of a Nuisance Defendant for Costs Incurred by Complying With an Injunction, 15 Ariz. L.Rev. 1004 (1973); Recent-Case Note, Remedies—Enjoining a Nuisance—Damages to the Defendant as a Condition of Granting the Injunction, 38 Mo.L.Rev. 135 (1973); Note, Land Use and Environmental Policy: Litigation of Nuisances As a Land Use Control: The Spur Industries Case, 26 Okla.L.Rev. 583 (1973); Annot., Nuisance: Right of One Compelled to Discontinue Business or Activity Constituting Nuisance to Indemnity from Successful Plaintiff, 53 A.L.R.3d 873 (1973). For an up-date on the *Spur Industries* case, see Reynolds, Of Time and Feedlots: The Effect of *Spur Industries* on Nuisance Law, 41 Wash. U.J. Urban & Contemp. L. 75 (1992). Compare Payne v. Skaar, 127 Idaho 341, 900 P.2d 1352 (1995) (court not required to grant permanent injunction against feedlot which had been declared private nuisance where complaining citizens did not show that only total closure or relocation would abate nuisance and entirely closing feedlot would be momentous invasion of owner's property rights). Cf. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970) (injunction would be vacated on payment by defendant of permanent damages to plaintiffs). As to the significance of plaintiff's having "moved to" an existing nuisance, see Annot., "Coming to Nuisance" as a Defense or Estoppel, 42 A.L.R.3d 344 (1972). See generally Prosser & Keeton, *supra* note 1, at 634; 58 Am.Jur.2d Nuisances §§ 216–17 (1971).

[6] See 1A Antieau, Municipal Corporation Law § 7.00 (1998). On what is regarded in the law as a "land use decision," see The Flight Shop v. Leading Edge Aviation, Inc., 277 Or. App. 638, 373 P. 3d (2016) (issuance of building permit qualifies as a "land use decision" and is thus reviewable by Land Use Board of Appeals); Westside Neighborhood Quality Project, Inc. v. School Dist. 4J Bd. of Directors, 58 Or.App. 154, 647 P.2d 962 (1982), review denied 294 Or. 78, 653 P.2d 999 (1982) (decision to close elementary school not a "land use decision" and thus not reviewable by state's Land Use Board of Appeals). Compare Heritage Enterprises v. City of Corvallis, 300 Or. 168, 708 P.2d 601 (1985) (determination of whether a proposed annexation is in accord with comprehensive plans is "land use decision"); 1000 Friends of Oregon v. Wasco County Court, 299 Or. 344, 703 P.2d 207 (1985) (incorporation of new city is "land use decision").

On past developments, and probable future developments, in the zoning and planning field, see generally Planning and Zoning Symposium Part I, 32 Urban Law. 447–611 (2000) & Planning and Zoning Symposium Part II, 32 Urban Law. 939–1038 (2000). On model laws for land use planning and regulation, see Mandelker, Model Legislation for Land Use Decisions, 35 Urban Law. 635 (2003), reviewing American Planning Association, Growing Smart Legislative Guidebook: Model Statutes for Planning and Management of Change 10–3 (Stuart Meck ed. 2002). See also Sax, Land Use Regulation: Time to Think About Fairness, 50 Nat. Resources J. 455 (2010).

On appropriate pedagogy in land-use courses, see Salkin & Nolan, Practically Grounded: Convergence of Land Use Law Pedagogy and Best Practices, 60 J. Legal Educ. 519 (2011), concluding that today "the traditional casebook method is not sufficient to fully prepare law students for the interdisciplinary and multi-faceted practice of land use and community development law."

[7] See Anderson, American Law of Zoning (5 vols. 3d ed. 1986 & 4th ed. 1995–97); Freilich & Stuhler, The Land Use Awakening (American Bar Ass'n 1981) (series of articles originally published in The Urban

on particular pieces of land appeared as early as the 1600s, modern American zoning is usually said to have started with an ordinance passed in 1916 by New York City.[8] It

Lawyer); Metzenbaum, Law of Zoning (3 vols. 2d ed. 1955); Rathkopf, The Law of Zoning & Planning (5 vols. 4th ed. 1995); Williams, American Land Planning Law (6 vols. 1985–89, with annual supps.); Yokley, Zoning Law and Practice (6 vols. plus Table & Index 1980); Stalcup & Williams, Zoning, 24 Sw.L.J. 41 (1970). As to land-use terms and definitions, see Endres, Bioenergy, Resource Scarcity and the Rising Importance of Land Use Definitions, 88 North Dak. L. Rev. 559 (2012). An excellent analysis of zoning in operation is Babcock, The Zoning Game—Municipal Practices & Policies (U. of Wisconsin Press 1969). See also Mandelker, The Zoning Dilemma (1971); Peterson & McCarthy, Handling Zoning and Land Use Litigations: A Practical Guide, (Michie Co. 1982). A valuable historical source is Bassett, Zoning: The Laws, Administration and Court Decisions During the First Twenty Years (Russell Sage Foundation 1936). For a discussion of land-use patterns in pre-zoning days, see Cappel, A Walk Along Willow: Patterns of Land Use Coordination in Pre-Zoning New Haven (1870–1926), 101 Yale L.J. 617 (1991). For an entertaining account of an early case invalidating zoning actions of a municipality, see Power, Pyrrhic Victory: Daniel Goldman's Defeat of Zoning in the Maryland Court of Appeals, 82 Md. Hist. Mag. 275 (Winter 1987). An analysis of where and how the modern concept of zoning developed is Kosman, Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning, 43 Catholic U.L. Rev. 59 (1993). For a treatment of land-use controls as collective property rights, see Fischel, The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls (John Hopkins Univ. Press 1987), reviewed 22 Urban Law. 345 (1990). On land-use controls in general, see Mandelker, Land Use Law (5th ed. 2003); Moss (ed.), Land Use Controls in the United States (Natural Resources Defense Council, Inc. 1977). See also Burchell & Listokin, Future Land Use (Center for Urban Policy Research 1975) (collection of papers); Symposium; Land Use in the 21st Century: The New Frontier for Environmental Law, 23 Wm. & M. Envtl. L. & Pol'y R. 705–855 (1999). Other outstanding books in the land-use area include: Juergensmeyer & Roberts, Hornbook on Land Use Planning & Development Regulation Law (3d ed. 2013); Mandelker, Payne, Salsich & Stroud, Planning and Control of Land Development: Cases and Materials (6th ed. LexisNexis 2005); Nolon & Salkin, Land Use in a Nutshell (2006); Cope, The Zoning and Land Use Handbook (ABA Section of State and Local Government Law 2016); Salsich and Trynicki, Land Use Regulation: A Legal Analysis and Practical Application of Land Use Law (ABA Section of Real Property, Trust and Estate Law 2016); Nolon, Salkin, Miller, and Rosenbloom, Land Use and Sustainable Development Law (American Casebook Series 9th ed. 2017). See generally Glicksman & Coggins, Modern Public Land Law in a Nutshell (3d ed. 2006); Salkin, Trends in Land Use Law from A to Z: Adult Uses to Zoning (American Bar Ass'n Section of State and Local Government Law 2002). For a comparison of trends in the United States land law with those in other countries, see Nolon, Comparative Land Use Law: Patterns of Sustainability, 37 Urban Law. 807 (2005). See also Lewyn, Land Use Regulation: It Just Gets Worse, 2 U. Baltimore J. Land & Development 1 (2012), reviewing Talen, City Rules: How Regulations Affect Urban Form (2011); Tarlock, Land Use Regulation: The Weak Link in Environmental Protection, 82 Wash. L. Rev. 651 (2007).

[8] Lefcoe, An Introduction to American Land Law 218–19 (1974) (with summary of the New York ordinance). See Juergensmeyer & Roberts, Land Use Planning & Control Law 42 (1998). See generally Hagman & Juergensmeyer, Urban Planning & Land Development Control Law (2d ed. 1986). Even before the New York ordinance (which was upheld in Lincoln Trust Co. v. Williams Building Corp., 229 N.Y. 313, 128 N.E. 209 (1920), and which remains on the books today in somewhat amended form), height restrictions on buildings had been imposed by some localities; and the constitutionality of such a restriction was upheld in Welch v. Swasey, 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923 (1909). And one authority reports that a system similar to modern zoning had been initiated in Germany in the late 1800s. Lefcoe, *supra* at 218. On the history of American zoning, see generally Toll, Zoned American (1969). See also Maltbie, The Legal Background of Zoning, 22 Conn.B.J. 2 (1948). For a study of the impact of zoning on placement of social activities, see Willhelm, Urban Zoning and Land-Use Theory (Free Press of Glencoe 1962). One major American city—Houston, Texas—developed with hardly any zoning restrictions, and some feel that its experience proves that such restrictions are neither necessary nor desirable. See Siegan, Land Use Without Zoning (Heath & Co. 1972), particularly Ch. 2. In 1993, Houston voters, for the third time in 45 years, rejected a proposed zoning law, thus retaining Houston's distinction as the nation's largest city without zoning. See generally Comment, Land Use Regulation in Houston Contradicts the City's Free Market Reputation, 34 Envtl. L. Rep. News & Analysis 10003 (2004). On the use of restrictive covenants as a substitute for, or in addition to, zoning laws, see Kerbel, Zoning and the Complicated Reliance on Restrictive Covenants, 12 FIU L. Rev. 263 (2017); Note, Public Actors, Private Law: Local Governments' Use of Covenants to Regulate Land Use, 124 Yale L. J. 1798 (2015).

Height restrictions on buildings, which were among the first types of zoning laws, have once again become popular in recent times, in an effort to alleviate the congestion, noise, and darkness attributed to the proliferation of skyscrapers in many cities. See "Outlawing the Modern Skyscraper," Time, July 22, 1985, at 56, noting the rules governing development in downtown San Francisco. On early height restrictions, see Power, High Society: The Building Height Limitation on Baltimore's Mt. Vernon Place, 79 Md. Hist. Mag. 197 (Fall, 1984). On the unusual history of height restrictions in Philadelphia (where there was long an unwritten agreement that no structure should be higher than the statue of William Penn atop City Hall—an agreement

resembled much of the zoning still found today in that it was comprehensive (*i.e.*, it covered all the city except areas specifically designated as unrestricted); it classified various uses of property (residential, commercial, etc.) and created zones for these uses; and it also included restrictions on the height and bulk of structures. Some early attempts at zoning relied not on the police power, but on the power of eminent domain: certain uses would be forbidden as to certain properties upon the payment of compensation to the owners of those properties, the theory being that some of their rights were being "taken." Such zoning is still possible, and has been used and upheld in Missouri;[9] but it has the obvious practical difficulty of being expensive to the zoning community. Thus, more and more communities in the early decades of the 20th century began experimenting with zoning as an exercise of the *police power*: legislative restrictions imposed on use and development of property, with no compensation being paid in return for the restriction.

The validity of such zoning remained in doubt until 1926. Up to that time, the main zoning issue dealt with by the U.S. Supreme Court was that of whether or not certain uses of property—as for a billboard, a home for older persons, etc.—could be made dependent on the consent of neighboring property-owners. Gradually, the law as to this problem has developed: imposition of particular zoning restrictions cannot be made to depend on the consent of neighbors, as this is an unlawful delegation of governmental authority.[10] This is subject to two qualifications: (1) Adoption or amendment of zoning ordinances may validly require, as a prerequisite to the legislative action, the consent of a designated percentage of near-by property owners.[11] (2) Many courts—perhaps most that have ruled on the question in recent times—have upheld zoning ordinances that permit the *lifting* of restrictions if the consent of a designated percentage of neighbors is obtained.[12]

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that was finally breached in 1986), see Gerber, "No-Law" Urban Height Restrictions: A Philadelphia Story, 38 Urban Law. 111 (2006). As to the development of land-use controls in New York, see Salkin & Bacher, Modernization of New York's Land Use Laws Continues to Meet Growing Challenges of Sustainability, 29 Pace L. Rev. 563 (2009). See generally Anderson, Zoning and Land Use, 64 SMU L. Rev. 617 (2011); Iovine, Zoning Laws Grow Up, N.Y. Times, Jan 19, 2012, at D6, stating that in New York City, "zoning has assumed a more activist role than ever before." On using height restrictions to preserve scenic views, see Wright, Limiting Building Height: The Story of a Citizens Initiative to Preserve Mountain Vistas and a City's Future, 27 Colo. Nat. Resources, Energy & Envtl. L. Rev. 245 (2016).

[9] See Kansas City v. Kindle, 446 S.W.2d 807 (Mo.1969). See generally 1A Antieau, Municipal Corporation Law § 7.03 (1998). See also Berger, A Policy Analysis of the Taking Problem, 49 N.Y.U.L.Rev. 165 (1974).

[10] See Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928) (ordinance prohibiting old people's homes in certain areas unless neighbors consented; invalidated); Marta v. Sullivan, 248 A.2d 608 (Del.1968) appeal after remand 256 A.2d 736 (apartments permitted in neighborhood only if 75% of residents within radius of one-eighth of a mile approved; invalidated); State ex rel. Foster v. City of Minneapolis, 255 Minn. 249, 97 N.W.2d 273 (1959); Concordia Collegiate Institute v. Miller, 301 N.Y. 189, 93 N.E.2d 632 (1950); Roman Catholic Archbishop v. Baker, 140 Or. 600, 15 P.2d 391 (1932). Cf. Eubank v. Richmond, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912) (invalidating delegation of authority to neighbors to establish "setback" line from street).

[11] See City of Stockton v. Frisbie & Latta, 93 Cal.App. 277, 270 P. 270 (Dist.Ct. 1928); Building Inspector v. Stoklosa, 250 Mass. 52, 145 N.E. 262 (1924); O'Brien v. City of St. Paul, 285 Minn. 378, 173 N.W.2d 462 (1969).

[12] Thomas Cusack Co. v. Chicago, 242 U.S. 526, 37 S.Ct. 190, 61 L.Ed. 472 (1917) (signs prohibited in residential neighborhoods unless neighbors consented); Downey v. Sioux City, 208 Iowa 1273, 227 N.W. 125 (1929); East Lansing v. Smith, 277 Mich. 495, 269 N.W. 573 (1936); State ex rel. Standard Oil Co. v. Combs, 129 Ohio St. 251, 194 N.E. 875 (1935). Cf. Gorieb v. Fox, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927) (setback provision that house could be no closer to street than the average of 60% of houses on a block; upheld). But cf. Drovers Trust & Savings Bank v. City of Chicago, 16 Ill.2d 589, 158 N.E.2d 620 (1959) (consent provisions in zoning ordinances may be valid, but particular provision struck down as unreasonable). The

§ 18.3 Zoning—Development from 1926 Until Today

In the celebrated 1926 case of *Village of Euclid v. Ambler Realty Co.*, the U.S. Supreme Court upheld zoning as a potentially constitutional exercise of the police power.[13] Specifically, the Court found no violation of due process in reasonable restrictions on the use of land; the system there upheld was of the type that has come to be called "Euclidean zoning": the community was divided into a geometric pattern of use districts (usually of three kinds: residential, commercial, and industrial or unrestricted), with all land being placed in one of the categories. This early type of zoning was usually also cumulative: only the highest use was exclusive, and residential use was considered the highest. Thus, in a residential zone, no other uses would be permitted. But in the "loweruse" zones, the "higher" uses would also be allowed—a residence could, for instance, be established in a commercial or an industrial zone.

In a 1928 case, the Supreme Court invalidated a zoning ordinance as applied to a particular parcel of land because it had the result of making part of the parcel of little possible value and because the public good was found not to be promoted by this particular zoning.[14] This case seemed to indicate that the Court would readily and

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Cusack case, *supra*, was distinguished in the *Roberge* case, *supra* note 10, on the ground that *Cusack* dealt with signs, which may be considered quasi-nuisances and as to which greater restrictions are thus allowed. See Havinghurst, Property Owners' Consent Provisions in Zoning Ordinances, 36 W.Va. L.Q. 175 (1930). Another frequently encountered type of provision in zoning laws stipulates that where a proposed amendment is protested (usually through signing a petition) by a designated percentage of the property owners in the affected area (or within a certain distance of that area), the amendment can only be adopted by a specified supermajority vote (usually three-fourths) of the city governing body. Such provisions have nearly always been held valid. See Annot., Zoning: Validity and Construction of Provisions of Zoning Statute or Ordinance Regarding Protest by Neighboring Property Owners, 7 A.L.R.4th 732 (1981).

Because zoning is a legislative function, zoning laws are presumed constitutional and otherwise valid. See 1 Rathkopf, The Law of Zoning and Planning § 5.02 (1988). But it has been noted that zoning laws are, in practice, often subjected to intense judicial review. See Mandelker & Tralock, Shifting the Presumption of Constitutionality in Land-Use Law, 24 Urban Law. 1 (1992).

[13] 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), noted 40 Harv.L.Rev. 644 (1927), 25 Mich.L.Rev. 907 (1927), 13 Va. L.Rev. 321 (1927), 36 Yale L.J. 427 (1927). See Note, Zoning Texas Cities—Constitutionality of Comprehensive City Plan Ordinances, 5 Tex.L.Rev. 307 (1927). The Court may have been influenced toward the Village of Euclid ordinance by the brief filed by Alfred Bettman as Counsel for the National Conference on City Planning and various other groups that appeared in the case as *amici curiae*. The brief is reprinted in Bettman, City and Regional Planning Papers 157–93 (1946). A sidelight on the Court's deliberations in the *Euclid* case (which was argued to the Court twice before it was decided) appears in McCormack, A Law Clerk's Recollections, 46 Colum.L.Rev. 710, 712 (1946) (Justice Sutherland changed his mind—and thus the decision). On the subsequent healthy growth of the municipality of Euclid, see 1 Metzenbaum, The Law of Zoning 60 (2d ed. 1955); Oyaski, Economic Erosion: The Case Against Urban Sprawl, 22 State & Local L. News, No. 3, at 5 (Spring, 1999) (discussing the development of *Euclid* and urging growth controls). On the place of the *Village of Euclid* case in modern law, see Wolf, Euclid at Threescore Years and Ten: Is This the Twilight of Environmental and Land-Use Regulation?, 30 U. Richmond L. Rev. 961 (1996) (part of a symposium on The Future of Environmental and Land-Use Regulation). See generally (in the same symposium) Haar, The Twilight of Land-Use Controls: A Paradigm Shift?, 30 U. Richmond L. Rev. 1011 (1996).

The *Euclid* case has continued to be recognized as an important landmark in the law of land use control. See Claeys, *Euclid* Lives? The Uneasy Legacy of Progressivism in Zoning, 73 Fordham L. Rev. 731 (2004) & response by Haar & Wolf, Yes, Thankfully, *Euclid* Lives, 73 Fordham L. Rev. 771 (2004); Symposium on the Seventy-Fifth Anniversary of *Village of Euclid v. Amber Realty Co.*, 51 Case W. Res. L. Rev. 593 (2001). It has been observed that the influence of the *Euclid* case has not always been beneficial. See Note, Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning, 68 U. Pitt. L. Rev. 915 (2007). See generally Wolf, The Zoning of America: *Euclid v. Ambler* (University Press of Kansas 2008). See also Batchis, Enabling Urban Sprawl: Revisiting the Supreme Court's Seminal Zoning Decision—*Euclid v. Ambler* in the 21st Century, 17 Va. J. Soc. Pol'y & L. 373 (2010).

[14] Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928), noted 3 U.Cin.L.Rev. 319 (1928), 7 Tex. L.Rev. 157 (1928). See Comment, Zoning—Restrictions in Particular Cases Limited to a Reasonable Exercise of Power, 8 Bost. U.L.Rev. 330 (1928).

carefully scrutinize challenged zoning laws. But the Court then fell silent on the subject; and with scarcely any exceptions,[15] it did not speak again on the matter until cases in the 1970s dealing largely with attempts to exclude multi-family dwellings and other "undesirable" uses from neighborhoods[16] or with the question of standing to object to zoning ordinances.[17]

But the basic principles had been established by the *Euclid* case and its predecessors: (1) Zoning can be constitutional if it is reasonable, and bears a reasonable relationship to community health, safety, morality, or general welfare.[18] (2) Zoning is a

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[15] A couple of cases touched on zoning-type issues: In Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), the Court upheld the use of eminent domain in connection with urban-renewal projects and spoke of the government's legitimate concern in making cities attractive. In Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), an ordinance prohibiting excavations below water level in the town, and requiring excavations already below that level to be filled, was upheld, despite the resulting near-exclusion of quarries from the area—but there was no showing the land involved lacked other profitable uses. On the Court's silence on land-control cases during this period, see Johnson, Constitutional Law and Community Planning, 20 Law & Contemp. Prob. 199 (1955).

A notable case of this period was Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938), in which a zoning amendment classifying plaintiff's vacant lot as residential was struck down as leaving him no profitable use for the property. Compare Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 20 Cal.Rptr. 638, 370 P.2d 342 (1962) appeal dism'd 371 U.S. 36, 83 S.Ct. 145, 9 L.Ed.2d 112, where the court upheld a zoning law that prohibited a rock quarry on plaintiff's property even though there was evidence the property had no appreciable value for other purposes. The U.S. Supreme Court dismissed the appeal for want of substantial federal question. See generally, discussing the *Goldblatt* and *Consolidated Rock* cases *supra*, Sax, Takings and the Police Power, 74 Yale L.J. 36, 42–44 (1964). See also Dodrill, In Defense of "Footnote 4": A Historical Analysis of the New Deal's Effect on Land Use Regulation in the U.S. Supreme Court, 72 Law & Contemp. Probs. 191 (2009).

[16] Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (invalidating ordinance that limited occupancy of dwelling unit to a single family and narrowly defined "family"); Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) reh. denied 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (upholding ordinance that confined "adult" movie theatres, bookstores, etc. to certain areas); Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) (upholding ordinance that limited occupancy of one-family dwellings to traditional family-groups or groups of not more than two unrelated persons). Cf. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), saying that refusal to change zoning laws to permit low-rent housing projects is unconstitutional only if there is proof the refusal is motivated by racial or other illegal discrimination. All these cases are discussed later in this chapter in connection with the purposes of zoning laws.

[17] Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), laying down the standards as to who may attack exclusionary zoning practices.

[18] City of New Orleans v. La Nasa, 230 La. 289, 88 So.2d 224 (1956); Town of Lexington v. Simeone, 334 Mass. 127, 134 N.E.2d 123 (1956); Fass v. City of Highland Park, 321 Mich. 156, 32 N.W.2d 375 (1948). See Krom v. City of Elmhurst, 8 Ill.2d 104, 133 N.E.2d 1 (1956); Granger v. City of Des Moines, 241 Iowa 1356, 44 N.W.2d 399 (1950); State ex rel. Cooper v. Cowan, 307 S.W.2d 676 (Mo.App.1957); Roselle v. Wright, 37 N.J.Super. 507, 117 A.2d 661 (1955) aff'd 21 N.J. 400, 122 A.2d 506. It is often added that zoning ordinances will be set aside only if arbitrary, confiscatory, or discriminatory. See Nelson v. County Council, 214 Md. 587, 136 A.2d 373 (1957); Buckley v. City of Bloomfield Hills, 343 Mich. 83, 72 N.W.2d 210 (1955); Fowler v. City of Hattiesburg, 196 So.2d 358 (Miss.1967). Usually, courts say that the reasonableness and general validity of zoning must be judged according to circumstances at the time of the decision. See Gust v. Township of Canton, 342 Mich. 436, 70 N.W.2d 772 (1955). But it has been recognized that a regulation that is reasonable at one time may subsequently become unreasonable due to changed circumstances—and may then be invalidated. See Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 93 (1939); Miami Beach v. First Trust Co., 45 So.2d 681 (Fla.1949). And at least one opinion has said that a court, in judging the reasonableness of zoning, can look to the future and consider the betterment of an area that local officials, in enacting the zoning, are envisioning. Vickers v. Township Committee, 37 N.J. 232, 181 A.2d 129 (1962), cert. denied and appeal dism'd 371 U.S. 233, 83 S.Ct. 326, 9 L.Ed.2d 495. As to zoning for purposes of public health, see generally Wooten, McLaughlin, Chen, Fry, Mongeon and Graff, Zoning and Licensing to Regulate the Retail Environment and Achieve Public Health Goals, 5 Duke Forum for L. & Social Change 65–96 (2013). Compare as to trade regulations enacted for public health and/or other police-power purposes Section 23.2 *infra*.

legislative, not a judicial, function.[19] Municipalities were thus free to engage in this form of land-use control—though only to the extent the state had delegated them this power, since the police power resides initially in the states and is not inherent in municipalities.[20] But delegations to municipal governments of the power to zone are today found, to varying extents, in all states. And certain corollaries, and rules of interpretation, have come to be generally accepted. For instance, when a particular use is allowed in a zone, accessory (or "incidental") uses are also allowed—*i.e.*, those that are customarily associated with the principal use and either necessary to it or at least commonly to be expected along with it.[21] Thus, tennis courts, swimming pools and comparable facilities for the use of a dwelling's occupants will be allowed in a residential zone—though these accessory uses may sometimes be excluded from the *front* yards of the dwellings.[22] Another generally accepted rule is that federal and state governments

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[19] See City of Miami Beach v. Wiesen, 86 So.2d 442 (Fla.1956); Roll v. Troy, 370 Mich. 94, 120 N.W.2d 804 (1963). Thus, if a trial court attempts to tell a locality specifically how to zone, the decision is likely to be reversed on appeal. See Addis v. Smith, 225 Ga. 157, 166 S.E.2d 361 (1969). And if a statute purports to grant the judiciary the power to zone, it is likely to be ruled an unconstitutional delegation of legislative power. Coe v. City of Albuquerque, 76 N.M. 771, 418 P.2d 545 (1966). See Schwartz v. City of Flint, 426 Mich. 295, 395 N.W.2d 678 (1986) (procedures under which courts rezoned property after a zoning ordinance was found unconstitutional were ruled invalid as violative of the separation of judicial and legislative powers). Cf. Fiore v. Highland Park, 76 Ill.App.2d 62, 221 N.E.2d 323 (1966), cert. denied 393 U.S. 1084, 89 S.Ct. 867, 21 L.Ed.2d 776 (courts shouldn't usurp legislative function of making zoning classifications).

[20] See Boozer v. Johnson, 33 Del.Ch. 554, 98 A.2d 76 (1953); State v. Owen, 242 N.C. 525, 88 S.E.2d 832 (1955); Miller v. City of Memphis, 181 Tenn. 15, 178 S.W.2d 382 (1944). Thus, it has customarily been said that grants of power to zone will be strictly construed. See Livingston v. Davis, 243 Iowa 21, 50 N.W.2d 592 (1951). But like most such rules of strict construction, this is often now given little more than "lip service." See Himebaugh, Tie Goes to the Landowner: Ambiguous Zoning Ordinances and the Strict Construction Rule, 43 Urban Law. 1061 (2011), arguing that the strict construction rule, under which ambiguous zoning laws should be construed in favor of property owners, is in many courts overshadowed by judicial deference to zoning controls.

Of course, simply because a locality *does* possess the power to zone, it does not *have* to exercise such power. See Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968). But zoning quickly gained in popularity after the *Village of Euclid* case, *supra* note 13, and it is said that by the late 1920s, over 800 municipalities—and 58 of the 68 cities over 100,000 in population—were zoned. Lefcoe, An Introduction to American Land Law 219 (1974).

On model state legislation on zoning, see Babcock, Krasnowiecki & McBride, The Model State Statute, 114 U.Pa.L.Rev. 140 (1965). For discussion of the typical state zoning enabling statute and proposed changes to such legislation, see Babcock, The Zoning Game 160–66 (1966); Liebmann, The Modernization of Zoning: Enabling Act Revision as a Means to Reform, 23 Urban Law. 1 (1991). For an example of revision of a state zoning enabling act, see Chase, Primer on the New Zoning Enabling Act, 26 Suffolk U.L. Rev. 333 (1992), discussing the law enacted in Rhode Island in 1991.

[21] Town of Bloomfield v. Parizot, 88 N.J.Super. 181, 211 A.2d 230 (1965); State v. Mair, 39 N.J.Super. 18, 120 A.2d 487 (1956) (owner used part of premises for clinical laboratory, leased the rest for residential purposes; laboratory not accessory to residence); Wiley v. County of Hanover, 209 Va. 153, 163 S.E.2d 160 (1968). See Town of Needham v. Winslow Nurseries, 330 Mass. 95, 111 N.E.2d 453 (1953) (accessory use is dependent on or pertains to the main use). Cf. Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Utah App.1992) (commercial lodging facility held not necessary to main residential use). See generally Annot., Zoning: What Constitutes "Incidental" or "Accessory" Use of Property Zoned, and Primarily Used, for Business or Commercial Purposes, 60 A.L.R. 4th 907 (1988). As to "accessory dwelling units" (often called "ADU") that are often permitted in residential zones, see Brinig & Garnett, Room of One's Own? Accessory Dwelling Unit Reforms and Local Parochialism, 45 Urban Law. 519 (2013). See also Anderson v. Provo City Corp., 205 UT 5, 108 P.3d 701 (2005) (ordinance governing residential area near university allowed only those homeowners who resided in their homes to rent out "accessory" apartments; upheld as reasonably necessary to protect city's justifiable and legitimate interest in preserving single-family residential character of neighborhoods).

[22] See Hardy v. Calhoun, 383 S.W.2d 652 (Tex.Civ.App.1964) (private tennis court); Thomas v. Zoning Board, 241 S.W.2d 955 (Tex.Civ.App.1951) (private swimming pool). On the validity of restrictions on locating tennis courts and comparable facilities in front yards, see Town of Atherton v. Templeton, 198 Cal.App.2d 146, 17 Cal.Rptr. 680 (Dist.Ct.1961), upholding such a restriction. See generally Schindler, Banning Lawns, 82 Geo. Wash. L. Rev. 394 (2014); Annot., Application of Zoning Regulations to Golf Courses, Swimming Pools, Tennis Courts, or the Like, 32 A.L.R.3d 424 (1970); Annot., Statutes, Ordinances, or Regulations Relating to Private

enjoy exemption from municipal zoning laws, while units of local government enjoy such immunity only as to their governmental (not their proprietary) functions.[23] Thus, public

Residential Swimming Pools, 92 A.L.R.2d 1283 (1963); Annot., Construction and Application of Provision of Zoning Ordinance Which Permits Use for Accessory or Incidental Purposes, 150 A.L.R. 494 (1944). See also Friends of Eugene v. City of Eugene, 196 Or.App. 771, 103 P.3d 643 (2004) (ordinance allowing hospitals in residential zone was inconsistent with city's comprehensive plan; hospital might qualify as "auxiliary" to residential use in some circumstances, but nothing in ordinance ensured that proposed hospital would qualify as such use); City of Woodinville v. Northshore United Church of Christ, 139 Wash.App. 639, 162 P.3d 427 (2007) (permanent homelessness encampment was not a permissible accessory use of church property under city zoning code, as use was not incidental to a residence and was not an accessory use inside a church building).

Private garages are generally considered accessory to residential premises. Olson v. Zoning Board of Appeal, 324 Mass. 57, 84 N.E.2d 544 (1949); Schack v. Trimble, 28 N.J. 40, 145 A.2d 1 (1958) (even though garage was on adjacent lot). Cf. People v. Firestone, 48 Misc.2d 480, 265 N.Y.S.2d 179 (1965) (parking of school buses, but not repair thereof, was accessory use to a private school). But use of a garage in a residential neighborhood for commercial vehicles or for commercial purposes is not an accessory use. See Piper v. Moore, 163 Kan. 565, 183 P.2d 965 (1947); Borough of Northvale v. Blundo, 85 N.J.Super. 56, 203 A.2d 721 (1964) (commercial vehicles). Compare Smith v. Board of County Comm'rs, 137 N.M. 280, 110 P.3d 496 (2005) (amateur radio towers held incidental to residential use).

[23] Federal immunity unless Congress consents: United States v. Chester, 144 F.2d 415 (3d Cir.1944); Ann Arbor Township v. United States, 93 F.Supp. 341 (E.D.Mich.1950). State immunity unless otherwise provided by statute: State ex rel. Ohio Turnpike Commission v. Allen, 158 Ohio St. 168, 107 N.E.2d 345 (1952), cert. denied 344 U.S. 865, 73 S.Ct. 107, 97 L.Ed. 671; Rutgers, The State University v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972) (state university); Charleston v. Southeastern Construction Co., 134 W.Va. 666, 64 S.E.2d 676 (1950) (state office building). See Note, Municipal Power to Regulate Building Construction and Land Use by Other State Agencies, 49 Minn.L.Rev. 284 (1964). Cf. State v. City of Seattle, 94 Wn.2d 162, 615 P.2d 461 (1980) (city ordinance allowing board to designate historic sites could not constitutionally be applied to state-owned structures). But see University of Washington v. City of Seattle, 399 P. 3d 519 (Wash. 2017) (property owned by state university could be subject to city's landmarks preservation ordinance; applying statute that had been amended since *State v. City of Seattle, supra*). Counties, townships, and comparable units immune from municipal zoning unless statute provides otherwise: County of Los Angeles v. City of Los Angeles, 212 Cal.App.2d 160, 28 Cal.Rptr. 32 (Dist.Ct.1963); Appelbaum v. Saint Louis County, 451 S.W.2d 107 (Mo.1970) (county incinerator and landfill operation immune); Opinion of the Justices, 113 N.H. 217, 304 A.2d 872 (1973) (county courthouse immune); Green County v. City of Monroe, 3 Wis.2d 196, 87 N.W.2d 827 (1958) (city could not restrict building of county jail—jail is governmental function). There is some authority that counties enjoy the immunity only as to their governmental operations, not their proprietary. See Jefferson County v. City of Birmingham, 256 Ala. 436, 55 So.2d 196 (1951) (operation of sewage disposal plant by county was proprietary and thus subject to city zoning); County of Tompkins v. Powers, 43 Misc.2d 736, 252 N.Y.S.2d 206 (1964) (highway maintenance is governmental and thus not subject to local zoning). Cf. Sherman v. Town of Brentwood, 112 N.H. 122, 290 A.2d 47 (1972) (possible merit in argument of county hospital's immunity from local zoning, but issue found moot and not ruled on here). Governmental immunity from zoning laws generally does not continue to attach once a property is conveyed to a non-governmental owner. See Pima County v. Clear Channel Outdoor, Inc., 212 Ariz. 48, 127 P.3d 64 (App. 2006) (state's governmental function exemption from local zoning and building regulations did not transfer to outdoor advertising company when state transferred real property to it as just compensation in a condemnation action; county zoning regulation thus applied).

One local government is not, in its governmental activities, subject to the zoning of another local government: City of Scottsdale v. Municipal Court, 90 Ariz. 393, 368 P.2d 637 (1962) (sewage disposal plant; strong dissent); City of Bloomfield v. Davis County Community School District, 254 Iowa 900, 119 N.W.2d 909 (1963) (school district's gasoline storage tank and pump); Village of Larchmont v. Town of Mamaroneck, 208 App.Div. 812, 203 N.Y.S. 957 (1924), aff'd as modified per curiam 239 N.Y. 551, 147 N.E. 191 (village water works). But one local government may be subject to the zoning of another locality where the former is acting in its proprietary capacity. City of Treasure Island v. Decker, 174 So.2d 756 (Fla.App.1965) (toll gate on causeway). Cf. Wilmette Park Dist. v. Village of Wilmette, 112 Ill.2d 6, 96 Ill.Dec. 77, 490 N.E.2d 1282 (1986) (park district held not immune from village's zoning laws regarding the kind of lighting permitted, since there was no clear statutory immunity). These are the rules usually applied to one municipality acting within another, or to a school district or other special function district acting within a municipality. Some authorities seem willing, however, to grant *complete* immunity from zoning laws to any such local government acting within another's territory. See People ex rel. Scott v. North Shore Sanitary District, 132 Ill.App.2d 854, 270 N.E.2d 133 (1971) (sanitary district not subject to city zoning); Aviation Services v. Board of Adjustment of Hanover Tp., 20 N.J. 275, 119 A.2d 761 (1956).

Zoning ordinances are often held inapplicable to *all* properties of the municipality enacting those ordinances. Sometimes such exemptions are specifically provided by the ordinances themselves, and such an exemption will be sustained as reasonable. See McCarter v. Beckwith, 247 App.Div. 289, 285 N.Y.S. 151 (1936), aff'd 272 N.Y. 488, 3 N.E.2d 882, cert. denied 299 U.S. 601, 57 S.Ct. 194, 81 L.Ed. 443; City of Cincinnati v. Wegehoft, 119 Ohio St. 136, 162 N.E. 389 (1928). Sometimes the exemption is "read in." See Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 33 P.2d 672 (1934) (water wells and pumps); Decatur Park District v. Becker, 368 Ill. 442, 14 N.E.2d 490 (1938) (public parks); Thornton v. Village of Ridgewood, 17 N.J. 499, 111 A.2d 899 (1955). Cf. Glascock v. Baltimore County, Maryland, 321 Md. 118, 581 A.2d 822 (1990) (county has immunity from its own zoning regulations when there is no specific restriction made by the legislature requiring adherence to the ordinance). But where the exemption is not specified by the applicable ordinances, what is probably the *majority* of authority states that the exemption applies only to governmental properties of the enacting municipality, not proprietary ones. See Lauderdale County Board of Education v. Alexander, 269 Ala. 79, 110 So.2d 911 (1959); Taber v. Benton Harbor, 280 Mich. 522, 274 N.W. 324 (1937) (municipality could not erect water tower in violation of its own height limitation); O'Brien v. Town of Greenburgh, 239 App.Div. 555, 268 N.Y.S. 173 (1933), aff'd without opinion 266 N.Y. 582, 195 N.E. 210 (1935) (garbage disposal plant proprietary, subject to zoning); Kedroff v. Town of Springfield, 127 Vt. 624, 256 A.2d 457 (1969) (sewage treatment plant ruled governmental, thus allowed in residential zone). In some jurisdictions, one government is not subject to the zoning of the other if the former could take property within the other by eminent domain. See City of Scottsdale v. Municipal Court, *supra*; Aviation Services v. Board of Adjustment of Hanover, *supra*. But the Minnesota court rejected this in favor of a "balancing-of-the-public-interests" test. Town of Oronoco v. City of Rochester, 293 Minn. 468, 197 N.W.2d 426 (1972). See generally Note, Governmental Immunity from Local Zoning Ordinances, 84 Harv.L.Rev. 869 (1971) (noting criticisms of governmental-proprietary test and discussing other tests); Comment, The Inapplicability of Municipal Zoning Ordinances to Governmental Land Uses, 19 Syracuse L.Rev. 698 (1968); Comment, The Applicability of Zoning Ordinances to Governmental Land Use, 39 Texas L.Rev. 316 (1961); Annot., Applicability of Zoning Regulations to Governmental Projects or Activities, 62 A.L.R.2d 970 (1958).

There is a trend, in the area of intergovernmental immunity from zoning, away from flat rules and toward a "balancing" approach, such as taken in the *Town of Oronoco* case *supra*. See City of Crown Point v. Lake County, 510 N.E.2d 684 (Ind. 1987) (local land-use decision, while initially binding on other governmental unit, is subject to judicial review by balancing the public interests involved; city could enforce its zoning laws against county buildings); City of Ames v. Story County, 392 N.W.2d 145 (Iowa 1986) (with review and rejection of tests previously used); Independent School Dist. No. 89 v. Oklahoma City, 722 P.2d 1212 (Okl.1986) (school districts not automatically immune from city zoning; court should consider legislative intent, which, if unclear, is to be determined by weighing such factors as nature of instrumentality seeking immunity, kind of function or planned use involved, extent of public interest to be served, effect the local land-use regulation would have on enterprise concerned, and impact on legitimate local interests). Cf. Native Village of Eklutna v. Alaska R.R., 87 P.3d 41 (Alaska 2004) (state legislature did not clearly exempt state-operated railroad from local zoning laws, so "balancing of interests" test was proper to use for determining legislative intent; but balancing test would not be used until railroad made good faith effort to comply with local regulations). See generally Lehavi, Intergovernmental Liability Rules, 92 Va. L. Rev. 929 (2006). See also Taylor & Wyckoff, Intergovernmental Zoning Conflicts Over Public Facilities Siting: A Model Framework for Standard State Acts, 41 Urban Law. 653 (2009).

Zoning laws are sometimes held inapplicable to public utilities, even where the utilities are not owned by any level of the government. See Freight, Inc. v. Board of Township Trustees, 107 Ohio App. 288, 158 N.E.2d 537 (1958). But there is contrary authority. See Porter v. Southwestern Public Service Co., 489 S.W.2d 361 (Tex.Civ. App.1972), ref'd n. r. e. (not automatically exempt even though have power of eminent domain). It seems the immunity will at least exist where utilities would otherwise be totally excluded from the municipality. See Annot., Applicability of Zoning Regulations to Projects of Nongovernmental Public Utility as to Which Utility Has Power of Eminent Domain, 87 A.L.R.3d 1265 (1978). Or where the state is found to have pre-empted the field of utility regulation. See Note, Application of Local Zoning Ordinances to State-Controlled Public Utilities and Licensees: A Study in Preemption, 1965 Wash.U.L.Q. 195. See generally Note, Municipal Corporations—Control Over Public Utilities Through Zoning Ordinances, 42 N.C.L.Rev. 761 (1964). See also Note, Zoning and the Expanding Public Utility, 13 Syracuse L.Rev. 581 (1962).

Where a lessee of government-owned land is involved, the courts often apply—regardless of the levels of government involved—the governmental-proprietary test, finding immunity as to governmental uses of land but not as to proprietary. See Annot., Applicability of Zoning Regulation to Nongovernmental Lessee of Government-Owned Property, 84 A.L.R.3d 1187 (1978). See also Annot., Application of Zoning Regulation to Radio or Television Facilities, 81 A.L.R.3d 1086 (1977) (zoning usually applicable to such facilities despite federal licensing).

schools are commonly exempt from zoning ordinances,[24] while private and parochial schools are not.[25]

Within the limits laid down by the *Euclid* case, zoning can occur. If the limits—as of reasonableness, for instance—are overstepped, the police power is then being

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[24] See Note, Immunity of Schools from Zoning, 14 Syracuse L.Rev. 644 (1963); Annot., Zoning Regulations as Applied to Public Elementary and High Schools, 74 A.L.R.3d 136 (1976); Annot., Zoning Regulations as Applied to Colleges, Universities, or Similar Institutions for Higher Education, 64 A.L.R.3d 1138 (1975). See generally Annot., What Constitutes "School," "Educational Use," or the Like Within Zoning Ordinance, 64 A.L.R.3d 1087 (1975). See also Annot., Application of Zoning Regulations to College Fraternities or Sororities, 25 A.L.R.3d 921 (1969). On what is a "public school," see City of Little Rock v. Infant-Toddler Montessori School, Inc., 270 Ark. 697, 606 S.W.2d 743 (1980) (Montessori school not a "public school"). As to the effect that U.S. Supreme Court cases on school desegregation and diversity have had on zoning, see Note, A Narrow Path to Diversity: The Constitutionality of Rezoning Plans and Strategic Site Selection of Schools after *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 107 Mich. L. Rev. 501 (2008).

[25] See Annot., Zoning Regulations as Applied to Private and Parochial Schools Below the College Level, 74 A.L.R.3d 14 (1976). But problems of unequal treatment and undue discrimination may sometimes arise if zoning laws do in fact apply differently to public and private schools. Thus, an exclusion of *all* schools—public and private—from a residential area may be upheld. Roman Catholic Diocese v. Borough of Ho-Ho-Kus, 42 N.J. 556, 202 A.2d 161 (1964), later appeal 47 N.J. 211, 220 A.2d 97. But laws allowing public but not private schools within residential areas are likely to be struck down as unreasonable and/or capricious. See Roman Catholic Welfare Corp. v. Piedmont, 45 Cal.2d 325, 289 P.2d 438 (1955); Catholic Bishop of Chicago v. Kingery, 371 Ill. 257, 20 N.E.2d 583 (1939). See generally 1A Antieau, Municipal Corporation Law § 7.76 (1980); Reynolds, Zoning Private and Parochial Schools—Could Local Government Restrict Socrates and Aquinas?, 24 Urban Law. 305 (1992).

Churches and religious bodies are not necessarily exempt altogether from zoning regulations, but ordinances totally excluding such uses from municipalities have been uniformly invalidated—and most cases have invalidated ordinances totally excluding such uses from residential zones. Islamic Center of Mississippi, Inc. v. City of Starkville, Mississippi, 840 F.2d 293 (5th Cir. 1988) (city's denial of permit to use residentially zoned building as Islamic center violated free exercise clause of First Amendment). See Note, Churches and Zoning, 70 Harv.L.Rev. 1428 (1957); Annot., What Constitutes "Church," "Religious Use," or the Like Within Zoning Ordinance, 62 A.L.R.3d 197 (1975). See generally 1A Antieau, Municipal Corporation Law § 7.75 (1980); Annot., Zoning Regulations as Affecting Churches, 74 A.L.R.2d 377 (1960); Annot., Building Restrictions, By Covenant or Condition in Deed or by Zoning Regulation, as Applied to Religious Groups, 148 A.L.R. 367 (1944); Dalton, Litigating Religious Land Use Cases (2d ed. ABA Section of State and Local Government Law 2016). On what land uses are accessory to religious or educational institutions, see Annot., What Constitutes Accessory or Incidental Use of Religious or Educational Property Within Zoning Ordinance, 11 A.L.R. 4th 1084 (1982). There is a split of authority as to whether a school is an accessory use as to a permitted religious use of property. Compare City of Las Cruces v. Huerta, 102 N.M. 182, 692 P.2d 1331 (App. 1984), cert. denied 102 N.M. 225, 693 P.2d 591 (1984) (full-time parochial schools not among ancillary uses encompassed by zoning permits for churches), with Diocese of Rochester v. Planning Bd. of Brighton, 1 N.Y.2d 508, 154 N.Y.S.2d 849, 136 N.E.2d 827 (1956) (a school and a meeting room are accessory to permitted church use). Cf. Western Presbyterian Church v. Board of Zoning Adjustment, 862 F.Supp. 538 (D.D.C.1994) (church's feeding program for homeless persons was religious conduct which could not be substantially burdened by zoning laws in absence of compelling interest). Cemeteries have been held not "accessory" to religious uses of property; and rather severe restrictions or exclusions as to cemeteries have sometimes been upheld. See Annot., Zoning Regulations in Relation to Cemeteries, 96 A.L.R.3d 921 (1980). Even where specific religious facilities are permitted by a zoning law, problems of interpretation may arise. See City of Minneapolis v. Church Universal & Triumphant, 339 N.W.2d 880 (Minn.1983) (organization could qualify as "monastery" even though residents held jobs or attended schools in the community and otherwise participated in community life).

In Grace United Methodist Church v. City of Cheyenne, 427 F.3d 775 (10th Cir. 2005), it was held that while a church has a right to build and operate a day care center, it cannot choose to exercise that right wherever it pleases and could thus be validly barred by an ordinance, applicable to a low-density residential zone, that prohibited a day care center with more than 12 children.

Use of land for religious purposes may validly be found in violation of a *restrictive covenant* that does not permit such use. See Voice of the Cornerstone Church Corp. v. Pizza Property Partners, 160 S.W.3d 657 (Tex. Ct. App. 2005) (church's use of land for religious purposes violated restrictive covenant limiting land's use to commercial/light industry purposes; enforcement of the facially neutral covenant by injunction does not unconstitutionally burden church's freedom of religious expression). Cf. Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249 (10th Cir. 2005) (government relinquishment of an easement to a private religious group, and subsequent free speech restrictions on the religious group's privately owned land, did not violate the Establishment Clause).

exceeded; and the governmental action can be justified—if at all—only as a "taking" under the power of eminent domain.[26] The "takings" problem is often framed as involving drawing a line between valid regulatory exercises of the police power (which are not "takings" and do not require compensation by the government) and exercises of the power of eminent domain (which are "takings" and do require compensation).[27] It has been observed that zoning laws usually do not rise to the level of a taking of property, but that if the zoning interferes significantly with the use or enjoyment of property, the government has overstepped its police power and the law is no longer a land use regulation but does amount to a taking.[28] Changes have, of course, occurred in the typical zoning patterns since the *Euclid* case was decided. For example: (1) Many more types of zones—not just the basic three of residential, commercial, and industrial—are now commonly employed, as where "agricultural" zones are designated. And there are often sub-categories within zones: residential zones where only single-family dwellings are permitted, ones where multiple-family dwellings are allowed, ones where professional offices are also allowed, etc. (2) Cumulative zoning is no longer so fashionable as it once was; zones may now be designated "exclusively industrial," for instance, and the so-called "higher uses" will not then be allowed in that area. (3) The number of uses permitted in a zone as a matter of *right* has often decreased; many more uses are permitted if, and only if, some special permit is obtained—usually from a zoning or planning commission. Zoning has become less a matter of sweeping regulations, and more a matter of *ad hoc* restrictions, with numerous special exceptions, variances, etc. being recognized. (4) Zoning has grown from being largely a creature of the big cities and suburbs into a common-place type of regulation even in smaller communities and rural areas. (5) Finally—and definitely contrary to the traditional *Euclidean* zoning—zoning permitting a mixture of uses (residential, commercial, etc.) within a given area is now

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[26] See Comment, "Takings" Under the Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances, 30 Sw.L.J. 723 (1976), noting various cases in which governmental "takings" have been found, and suggesting a possible "inverse condemnation" action for monetary damages by a landowner whose property is severely restricted and/or lessened in value by zoning. In Lomarch Corp. v. Mayor and Common Council, 51 N.J. 108, 237 A.2d 881 (1968), a one-year freeze on construction in a proposed subdivision was held constitutional only if compensation was paid those damaged. In Peacock v. County of Sacramento, 271 Cal.App.2d 845, 77 Cal.Rptr. 391 (Dist.Ct.1969), compensation was held required for restrictive regulation around an airport. See generally Badler, Municipal Zoning Liability in Damages—A New Cause of Action, 5 Urban Lawyer 25 (1973); Kanner, Developments in Eminent Domain: A Candle in the Dark Corner of the Law, 52 U.Det.J.Urban L. 861 (1975); Comment, Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance, 26 Stan.L.Rev. 1439 (1974); Comment, Compensable Regulation: Outlines of a New Land Use Planning Tool, 10 Willamette L.J. 451 (1974).

On "takings" and "inverse condemnation" in general, see Chapter 19 *infra*.

An unusual instance in which a taking was found is McKinney v. City of High Point, 237 N.C. 66, 74 S.E.2d 440 (1953), where a city erected a water tower in violation of its own zoning ordinances. It was held that the city was immune from the zoning law in this governmental endeavor—see note 23 *supra*—but that the city would be held liable to a neighboring property-owner on the theory that his property had been so lessened in value as to have been "taken."

[27] See Keene, When Does a Regulation "Go Too Far"?—The Supreme Court's Analytical Framework for Drawing the Line Between an Exercise of the Police Power and an Exercise of the Power of Eminent Domain, 14 Penn St. Envtl. L. Rev. 397 (2006).

[28] See In re Initiative Petition No. 382, 142 P.3d 400, 406–07 (Okla. 2006). On the original intent of the "takings clause" in Article 5 of the U.S. Constitution, see Hart, Land Use Law in the Early Republic and the Original Meaning of the Takings Clause, 94 Nw. U.L. Rev. 1099 (2000). A good summary of subsequent interpretations of the "takings clause" is found in Note, Takings Jurisprudence and Complex Schemes of Land Use Regulation: What the Supreme Court Could Learn From the States, 33 Rutgers L.J. 457 (2002), noting Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999) (requirement that a claimant have investment-backed expectations in order to demonstrate a regulatory taking limits recovery to owners who can demonstrate that they bought their property in reliance on the nonexistence of the challenged regulation).

frequently encountered. This is often called "planned unit development." Somewhat similar in nature—and also directly contrary to "*Euclidean* ideas"—is the concept of a "floating zone": a zone not immediately effective but which will apply, to an area yet to be determined, when certain changes have occurred or specified conditions have been met.[29] Both "planned unit development" and "floating zones" have been much endorsed by writers and generally upheld; they are often thought to introduce much-needed elements of flexibility into the rigid classifications found under more traditional zoning techniques.[30]

§ 18.4 Zoning—Valid Purposes

Assuming a municipality is given the basic power to zone by state law, what are the purposes for which the municipality may validly zone? At least six main purposes may be mentioned[31] though in some instances, one such purpose may not be enough to uphold

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[29] See Sheridan v. Planning Board, 159 Conn. 1, 266 A.2d 396 (1969); Chatham Corp. v. Beltram, 243 Md. 138, 220 A.2d 589 (1966). See generally 1A Antieau, Municipal Corporation Law § 7.61 (1998); Reno, Non-Euclidean Zoning: The Use of the Floating Zone, 23 Md.L.Rev. 105 (1963); Annot., Zoning: Regulations Creating and Placing "Floating Zones," 80 A.L.R.3d 95 (1977). At one time, the validity of floating zones was in doubt. See Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (Pa. 1960) (not in accord with a comprehensive plan, as required by statute). But the validity today is established in most states. See Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951); State ex rel. Zupancic v. Schimenz, 46 Wis.2d 22, 174 N.W.2d 533 (1970). See generally Selmi & Kushner, Land Use Regulation—Cases and Materials 100–01 (Aspen 1999). On the difference between a floating zone and a fixed zone, see Bellemeade Co. v. Priddle, 503 S.W.2d 734, 738 (Ky.1973) (boundaries of floating zone are undefined until it becomes anchored).

[30] See Bigenho v. Montgomery County Council, 248 Md. 386, 237 A.2d 53 (1968), approving "floating zones." See generally Report, Planned Unit Developments and Floating Zones, 7 Real Property, Probate & Trust J. 61 (1972); Annot., Zoning: Planned Unit, Cluster, or Green Belt Zoning, 43 A.L.R.3d 888 (1972). On planned unit developments in particular, see Hanke, Planned Unit Development and Land Use Intensity, 114 U.Pa.L.Rev. 15 (1965); Krasnowiecki, Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control, 114 U.Pa.L.Rev. 47 (1965). See also Goldston & Scheur, Zoning of Planned Residential Developments, 73 Harv.L.Rev. 241 (1959); Note, Non-Euclidean "Zoning": Its Theoretical Validity and Practical Desirability in Undeveloped Areas, 30 U.Cin.L.Rev. 297 (1961). On possible problems created by a "planned unit development," see Kenart & Associates v. Skagit County, 37 Wash.App. 295, 680 P.2d 439 (1984) (board of county commissioners denied permit, finding that development would contribute to loss of agricultural lands, increase traffic levels and school population, and aggravate drainage problems; court remands for clarification of these findings). On planned unit developments and the related concept of "cluster zoning," see generally Section 21.5 *infra*.

Some communities have tried to achieve flexibility by making the whole municipality a single-use district and then granting numerous variances, special permits, etc. But this method has sometimes been invalidated as not providing adequately for various uses. See Rockhill v. Township of Chesterfield, 23 N.J. 117, 128 A.2d 473 (1957); Town of Hobart v. Challe, 3 Wis.2d 182, 87 N.W.2d 868 (1958). See generally Goldman, Zoning Change: Flexibility v. Stability, 26 Md. L.Rev. 48 (1966) (saying the *Rockhill* and *Hobart* cases *supra* are attempts at wholesale creation of floating zones); Haar & Hering, The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?, 74 Harv.L.Rev. 1552 (1961) (saying the cases represent a move altogether away from Euclidean zoning *and* from floating zones, toward the English system of zoning by special permit). On the distinction between "floating zones" and "special permits" (the latter of which are discussed in this chapter *infra*), see Summ v. Zoning Commission, 150 Conn. 79, 186 A.2d 160 (1962); Sieber v. Laawe, 33 N.J.Super. 115, 109 A.2d 470 (1954). On trends in, and the possible future development of, zoning law, see generally Micklow and Warner, Not Your Mother's Suburb: Remaking Communities for a More Diverse Population, 46 Urban Law. 729 (2014) (saying that communities need to challenge the underlying assumptions of traditional zoning ordinances: the separation of uses and the preference for single-family housing); Symposium, Post-Zoning: Alternative Forms of Public Land Use Controls, 78 Brooklyn L. Rev. 305–623 (2013).

[31] See Hagman & Juergensmeyer, Urban Planning & Land Development Control Law 51–52 (2d ed. 1986); Juergensmeyer & Roberts, Land Use Planning & Control Law 45–59 (1998), both noting that zoning must (1) be within valid police-power purposes, and (2) be within the purposes for which zoning is authorized by the relevant state law—usually the zoning enabling act. See also the purposes mentioned in Section 1 of the Standard State Zoning Enabling Act, reprinted at 5 Anderson, American Law of Zoning § 32.01 (5th ed. 1997); Hagman & Juergensmeyer, *supra* at 55; Juergensmeyer & Roberts, *supra* at 46; 5 Rathkopf, The Law

a zoning law's validity: for instance, it is sometimes said that aesthetics alone cannot support a zoning ordinance, but only when coupled with some other purpose as well. (All these purposes, it should be noted, flow from the police power and the basic desire to exclude harmful uses from various neighborhoods.)[32]

One purpose usually recognized as proper is the conserving and maintaining of property values in a community. It has been said that local authorities, in enacting zoning laws, may consider the resulting increase in property valuations and the other economic advantages to the municipality.[33] Certainly the sum total of real property values in a community should be increased by the orderly development that will hopefully flow from zoning laws—as opposed to the haphazard development that might otherwise occur. But it must be emphasized that it is the welfare of the community as a whole with which the zoning authorities should be concerned,[34] and that zoning may be valid though it actually depresses (as it frequently will) the value of some parcels of land. Thus, it has often been held that zoning as applied to particular property is not necessarily unreasonable simply because the property would be more valuable if zoned so as to allow different or additional uses.[35] Mere financial loss, such as lessening of profits, does not, even though directly attributable to the zoning classification of the property, invalidate the zoning restrictions.[36] Still, a loss in value as to particular property will be weighed as *one factor* in determining the reasonableness of the zoning law as applied to that property;[37] and the zoning *will* be invalidated if the point is

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of Zoning and Planning Appendix A (4th ed. 1995). See 1 Anderson, American Law of Zoning §§ 2.21–.28 (4th ed. 1995), summarizing the Standard Act.

[32] See Kaplan v. City of Boston, 330 Mass. 381, 113 N.E.2d 856 (1953) (primary purpose is preservation of neighborhoods against deleterious uses).

[33] See Addison-Wesley Publishing Co. v. Town of Reading, 354 Mass. 181, 236 N.E.2d 188 (1968). But cf. Glassey v. County of Tazewell, 11 Ill.App.3d 1087, 297 N.E.2d 235 (1973) (a use may not be denied merely because it might increase governmental costs; application for mobile home park). In many jurisdictions, zoning is now enacted by counties as well as municipalities. See Motta v. Granite County Comm'rs, 304 P.3d 720 (Mont. 2013) (zoning districts within county could be established either by citizen petition or directly by board of county commissioners); Wilson Advisory Committee v. Board of County Comm'rs, 292 P.3d 855 (Wyo. 2012) (broad grant of authority to county commissioners to promulgate zoning ordinances includes both express power to enact zoning and implied power to do what is necessary to make exercises of the express power meaningful in the unincorporated areas of the county). See generally Section 6.2, notes 31–35 and accompanying text, *supra*, on home rule in counties. See also Section 2.5 on counties, *supra*.

[34] See Save a Valuable Environment v. City of Bothell, 89 Wn.2d 862, 576 P.2d 401 (1978) (zoning invalid if doesn't serve welfare of community as a whole). Cf. Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), appeal dism'd, cert. denied 423 U.S. 808, 96 S.Ct. 18, 46 L.Ed.2d 28 (bedroom restriction designed to limit number of families with children in community, and thus reduce education costs, is contrary to general welfare and hence void).

[35] Leventhal v. District of Columbia, 100 F.2d 94 (D.C.Cir.1938); City and County of Denver v. American Oil Co., 150 Colo. 341, 374 P.2d 357 (1962); Town of Surfside v. Abelson, 106 So.2d 108 (Fla.App.1958), cert. denied 111 So.2d 40 (Fla.1959); Elmhurst National Bank v. City of Chicago, 22 Ill.2d 396, 176 N.E.2d 771 (1961); Reiskin v. County Council, 229 Md. 142, 182 A.2d 34 (1962) (land would have been more profitable if zoned to allow multiple-family dwellings); Ulmer Park Realty Co. v. City of New York, 270 App.Div. 1044, 63 N.Y.S.2d 143 (1946), aff'd 297 N.Y. 788, 77 N.E.2d 797. See State National Bank v. Trumbull, 156 Conn. 99, 239 A.2d 528 (1968) (maximum enrichment of property owner is not the purpose of zoning); Turner v. City of Atlanta, 257 Ga. 306, 357 S.E.2d 802 (1987), cert. denied 485 U.S. 934, 108 S.Ct. 1108, 99 L.Ed.2d 269 (1988) (refusal to rezone not unconstitutional merely because property would be more valuable if rezoned).

[36] See Samp Mortar Lake Co. v. Town Plan and Zoning Commission, 155 Conn. 310, 231 A.2d 649 (1967); Dixon v. County of Kane, 77 Ill.App.2d 338, 222 N.E.2d 354 (1966); Levitt v. Incorporated Village of Sands Point, 6 N.Y.2d 269, 189 N.Y.S.2d 212, 160 N.E.2d 501 (1959). Cf. City of Baltimore v. Borinsky, 239 Md. 611, 212 A.2d 508 (1965) (no relief just because property owners show substantial loss from zoning law).

[37] Herzog v. City of Pocatello, 83 Idaho 365, 363 P.2d 188 (1961); Ervin Acceptance Co. v. City of Ann Arbor, 322 Mich. 404, 34 N.W.2d 11 (1948); Pearce v. Village of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962)

reached at which all otherwise legal or all beneficial uses of the property are forbidden,[38] or at which the only uses permitted are physically impossible given the nature of the property.[39] Most courts go somewhat farther than this and say that if all *reasonable* uses of the property are prohibited, the zoning is invalid as applied to that land.[40] The modern

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(also saying zoning invalid if enacted to protect enterprises from competition or to carry out aesthetic ideas of planning commission). Thus, where zoning results in extreme differentials in the resulting value of various pieces of property, this may be evidence the law is arbitrary. Pearce v. Village of Edina, *supra*. Or where property would be worth many times as much if zoned less restrictively. Town of Surfside v. Normandy Beach Development Co., 57 So.2d 844 (Fla. 1952) (property had little value for residential use, for which zoned, but had business value of $20,000).

[38] New Products Corp. v. City of North Miami, 271 So.2d 24 (Fla.App.1972) (land owned by private party zoned for use only as public park). See Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963); Chase v. City of Glen Cove, 41 Misc.2d 889, 246 N.Y.S.2d 975 (1964); Greenhills Home Owners Corp. v. Village of Greenhills, 202 N.E.2d 192 (Ohio App. 1964), cert. denied 385 U.S. 836, 87 S.Ct. 82, 17 L.Ed.2d 70 (protective belt of forest-land park created; amounted to a taking without just compensation). But the corporation in the *Greenhills* case, *supra*, was subsequently held "estopped" from attacking the zoning restriction as a taking, and the earlier judgment was reversed. Greenhills Home Owners Corp. v. Village of Greenhills, 5 Ohio St.2d 207, 215 N.E.2d 403 (1966), cert. denied 385 U.S. 836, 87 S.Ct. 82, 17 L.Ed.2d 70.

[39] See Robyns v. City of Dearborn, 341 Mich. 495, 67 N.W.2d 718 (1954). Cf. City of Evansville v. Reis Tire Sales, Inc., 165 Ind.App. 638, 333 N.E.2d 800 (1975) (natural ravine and resulting construction costs prevented any reasonable use of the property as zoned); Beachland Glass Co. v. Woodmansee, 11 Ohio Misc. 262, 230 N.E.2d 360 (1967) (if no economic use can be made of property, classification is arbitrary and unreasonable unless it promotes general welfare of community).

[40] See State ex rel. Taylor v. City of Jacksonville, 101 Fla. 1241, 133 So. 114 (1931); Northwest Merchants Terminal, Inc. v. O'Rourke, 191 Md. 171, 60 A.2d 743 (1948); City of Pittsfield v. Oleksak, 313 Mass. 553, 47 N.E.2d 930 (1943); Bassey v. City of Huntington Woods, 344 Mich. 701, 74 N.W.2d 897 (1956); Stevens v. Town of Huntington, 20 N.Y.2d 352, 283 N.Y.S.2d 16, 229 N.E.2d 591 (1967); Mary Chess, Inc. v. City of Glen Cove, 18 N.Y.2d 205, 273 N.Y.S.2d 46, 219 N.E.2d 406 (1966); Baronoff v. Zoning Board, 385 Pa. 110, 122 A.2d 65 (1956); Sundlun v. Zoning Board of Review, 50 R.I. 108, 145 A. 451 (1929); Chrome Plating Co. v. City of Milwaukee, 246 Wis. 526, 17 N.W.2d 705 (1945). Courts usually refer to such zoning as "confiscatory" or as a "taking" or "regulatory taking," and thus invalid, where the zoning permits no reasonable use to be made of the property. See Frankel v. City of Baltimore, 223 Md. 97, 162 A.2d 447 (1960); City of Plainfield v. Borough of Middlesex, 69 N.J.Super. 136, 173 A.2d 785 (1961); Mary Chess, Inc. v. City of Glen Cove, *supra*. Cf. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (Pennsylvania statute requiring that 50% of coal beneath certain structures be kept in place to provide surface support held not a "taking" of coal mines where there was no evidence that any mining operations or mines had been rendered unprofitable by the regulation); Griffin Dev. Co. v. City of Oxnard, 39 Cal.3d 256, 217 Cal.Rptr. 1, 703 P.2d 339 (1985) (land-use measure, such as limitation on conversion of apartments to condominiums, is invalid only if it deprives owner of substantially all reasonable use of his property). Compare State v. Johnson, 265 A.2d 711 (Me.1970) (Wetlands Act deprived owners of reasonable use of property and was thus a "taking"). The Supreme Court has ruled that where a zoning regulation deprives a landowner, even temporarily, of all reasonable use of his property, he is entitled not only to a judicial declaration of the invalidity of the zoning law but to compensation for the "taking" that occurred while the regulation was in effect. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), on remand 210 Cal.App.3d 1353, 258 Cal.Rptr. 893 (1989), cert. denied 493 U.S. 1056, 110 S.Ct. 866, 107 L.Ed.2d 950 (1990). Accord, Corrigan v. City of Scottsdale, 149 Ariz. 538, 720 P.2d 513 (1986). On the test used in determining whether a taking has occurred, see Cope v. City of Cannon Beach, 317 Or. 339, 855 P.2d 1083 (1993) (zoning ordinance prohibiting transient occupancy did not deny property owners all economically viable use of their property and thus did not effect a facial taking); Dodd v. Hood River County, 317 Or. 172, 855 P.2d 608 (1993) (test is whether the challenged ordinance allows landowners some substantial beneficial use of their property; forest zoning ordinance prohibiting landowners from building a dwelling on their property held not to constitute a taking); Margola Associates v. City of Seattle, 121 Wash.2d 625, 854 P.2d 23 (1993) (rent regulation found not a "total taking" because it didn't deny all economically viable use of owner's land). For background on the *Dodd* case *supra*, see Carlton, 'Takings' Cases Don't Always Favor Takers, Wall St. J., Nov. 10, 1992, at B1. For analysis of the *Lucas* case, *supra*, see Note, Unintended Consequences: *Lucas*, the Public Trust Doctrine, and the Erosion of Private Property Rights Under the Takings Clause, 2013 Utah L. Rev. 1687, and authorities cited in Section 19.2, note 29, *infra*. See also Pagano, Where's the Beach? Coastal Access in the Age of Rising Tides, 42 SW. L. Rev. 1 (2012). On Supreme Court development of the law on regulatory takings, see Delaney, What Does it Take to Make a Take? A Post-*Dolan* Look at the Evolution of Regulatory Takings Jurisprudence in the Supreme Court, 27 Urban Law. 55 (1995). See generally § 19.2 *infra*. See also Eagle,

law in this area is usually said to have originated in the *Penn Central* case,[41] setting forth—in order to determine whether a governmental regulation amounted to "taking"—a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-back expectations, and the character of the government action. The *Penn Central* test was clearly extended to cases of *temporary* regulation in the *Tahoe-Sierra* case,[42] where a moratorium on development imposed during the process of devising a comprehensive land-use plan was held not to constitute a per se taking of property, requiring compensation, but to depend on the particular circumstances of the case.[43] Constitutional provisions are generally held not to guarantee that each landowner will be allowed to make the most profitable use of his or her land.[44] Though courts occasionally speak of invalidating zoning laws

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"Economic Impact" in Regulatory Takings Law, 19 Hasting W.-Nw. J. Envtl. L. & Pol'y 407 (2013); Siegel, Evaluating Economic Impact in Regulatory Takings Cases, 19 Hastings W.-Nw. J. Envtl. L. & Pol'y 373 (2013); both articles are part of the Symposium from the 15th Annual Conference on Litigating Takings Challenges to Land Use & Environmental Regulations, 19 Hastings W.-NW. J Envtl. L. & Pol'y 337–545 (2013).

On the effect that cases such as the *First Evangelical* case, *supra*, have had on government regulations, see Merriam, Reengineering Regulation to Avoid Takings, 33 Urban Law. 1 (2001), stating that almost all governmental takings, both regulatory and physical, are avoidable. As to the differences between regulatory takings and regulatory exactions, see Comment, Confusing Regulatory Takings With Regulatory Exactions: The Supreme Court Gets Lost in the Swamp, 41 Boston Coll. Envtl. Affairs L. Rev. 555 (2014), commenting on Koontz v. St. Johns River Water Management Dist., 570 U.S. 595, 133 S.Ct. 2586 (2013). See also Section 19.2, note 24, *infra*, and accompanying text.

The present law of "takings" and its origins are well summarized in Karkkainen, The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle," 90 Minn. L. Rev. 826 (2006).

[41] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). At issue in that case was regulation for the purpose of historic preservation; see notes 83–85 *infra* and accompanying text.

[42] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

[43] See Kahn, Lake Tahoe Clarity and Takings Jurisprudence: The Supreme Court Advances Land Use Planning in *Tahoe-Sierra*, 26 Environs 33 (2002); Comment, After *Tahoe-Sierra*, One Thing Is Clearer: There Is Still a Fundamental Lack of Clarity, 46 Ariz. L. Rev. 353 (2004); Comment, Temporary Moratoria and Regulatory Takings Jurisprudence After *Tahoe-Sierra*, 27 Harv. Envtl. L. Rev. 277 (2003); Note, Taking Shape: Temporary Takings and the *Lucas* Per Se Rule in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority*, 82 Or. L. Rev. 189 (2003) (noting the effect that *Tahoe-Sierra* had on the law of the *Lucas* case, *supra*); Comment, Land Use Moratoria and Temporary Takings Redefined After Lake Tahoe?, 30 Pepperdine L. Rev. 273 (2003); Note, Will Regulations Keep Tahoe Blue? Searching for Stewardship in Property Law and Regulatory Takings Analysis, 27 Thomas Jefferson L. Rev. 187 (2004). See generally Note, Caught in the Toils of Regulation: *Tahoe-Sierra*, Ripeness, Permit Requirements, and a Measure of Relief, 79 Notre Dame L. Rev. 2079 (2004).

On the effect that the *Tahoe-Sierra* case, *supra*—as well as the decision in Brown v. Legal Foundation of Wash., 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) (often called the IOLTA case), dealing with clients' property rights in interest earned on lawyer trust accounts—has had on regulatory takings law, see Roberts, Regulatory Takings in the Wake of *Tahoe-Sierra* and the IOLTA Decision, 35 Urban Law. 759 (2003).

On a landowner's possible *damages* action where a governmental zoning or planning body has been judicially declared to have arbitrarily and capriciously denied a permit to develop land, or has denied such permission in violation of the landowner's due process or equal protection rights, see Wilson, Congratulations, You've Won a Steak Dinner: Recent Constitutional Claims for Damages in Land Use Litigation, 38 Urban Law. 713 (2006) (state court findings do not necessarily result in damages liability in federal court proceedings).

In McCarran Internatl. Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006) cert. denied 549 U.S. 1206, 127 S.Ct. 1260, 167 L.Ed.2d 76 (2007), it was held that county ordinances limiting building height on property adjacent to an airport constituted a *regulatory taking per se* (as opposed to the *Penn Central*-type takings cases) since the ordinances permitted the presence of aircraft over the owner's property at altitudes below 500 feet, authorized the permanent physical invasion of the owner's airspace, and excluded the owner from using his property. Regulatory per se takings were said to be relatively rare and easily identified, and usually to cause a greater affront to individual property rights then do *Penn Central*-type takings. *Id.* at 1124.

[44] Madis v. Higginson, 164 Colo. 320, 434 P.2d 705 (1967); Baum v. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961); Cobble Close Farm v. Middletown Township, 10 N.J. 442, 92 A.2d 4 (1952);

when those laws do not encourage the most appropriate use of property,[45] it seems that the invalidation actually occurs only if the courts find that (1) the particular property is lessened in value because the zoning laws do not allow it to be put to its highest or best use, *and* (2) there is no counterbalancing benefit to public health, safety, morality, or general welfare from such zoning.[46]

The stabilizing and homogenizing of areas may be considered another purpose behind zoning. Zoning classifications are ideally the outgrowth of an orderly plan for community development, with only certain uses, or certain mixes of uses, allowed in any particular zone. Indeed, statutes often require that zoning in each community be in accord with a "comprehensive plan" for the community: a plan relating to the present and reasonably foreseeable needs of the whole municipality.[47] Conformity to such a plan

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Scuteri v. Incorporated Village of Bayville, 120 N.Y.S.2d 794 (Sup.Ct.1953). See West Bloomfield Township v. Chapman, 351 Mich. 606, 88 N.W.2d 377 (1958), indicating that effective zoning would be impossible if each landowner were allowed to make the best possible use of his or her land. Cf. First National Bank v. County of Lake, 7 Ill.2d 213, 130 N.E.2d 267 (1955) (effect of zoning on land immediately involved is one factor to consider, but so is effect on other land in area); Dodge Mill Land Corp. v. Town of Amherst, 61 A.D.2d 216, 402 N.Y.S.2d 670 (1978) (only a showing that land as zoned cannot be properly used, leased or sold will entitle plaintiffs to have zoning invalidated). See generally Meltz, Merriam & Frank, The Takings Issue—Constitutional Limits on Land-Use Control & Environmental Regulation (Island Press 1999).

[45] See McGiverin v. City of Huntington Woods, 343 Mich. 413, 72 N.W.2d 105 (1955); Raskin v. Town of Morristown, 21 N.J. 180, 121 A.2d 378 (1956); Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954) (right to attack validity of zoning ordinance not waived by purchase with knowledge of restriction, or by unsuccessful application for variance, or by *failure* to seek variance).

[46] See La Salle National Bank v. City of Chicago, 5 Ill.2d 344, 125 N.E.2d 609 (1955). Cf. Dawson Enterprises, Inc. v. Blaine County, 98 Idaho 506, 567 P.2d 1257 (1977) (zoning ordinance may be valid though it restricts development of property to other than the most suitable use).

[47] Fairlawns Cemetery Association v. Bethel, 138 Conn. 434, 86 A.2d 74 (1952); Grooms v. LaVale Zoning Board, 27 Md.App. 266, 340 A.2d 385 (1975). See, applying a similar standard of "comprehensive plan," Ward v. Montgomery Township, 28 N.J. 529, 147 A.2d 248 (1959). It has been observed that Maryland does not by statute specify that zoning must be in accord with a comprehensive plan; but the courts have applied similar standards in requiring some overall organization. See Nottingham Village, Inc. v. Baltimore County, 266 Md. 339, 292 A.2d 680 (1972) (also noting that a "comprehensive plan" need not conform to a master plan). Where a "comprehensive plan" *is* specifically required by statute, this does not necessarily mean a written plan, or master plan, based on a comprehensive study; the ordinances themselves may reveal sufficient orderly planning. Toole v. May-Day Realty Corp., 101 R.I. 379, 223 A.2d 545 (1966). The basic requirement is that there be proof that consideration has been given, in drafting the specific ordinances, to the needs of the community as an entirety. See Udell v. Haas, 21 N.Y.2d 463, 288 N.Y.S.2d 888, 235 N.E.2d 897 (1968). Cf. Lazy Mtn. Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals, 904 P.2d 373 (Alaska 1995) (comprehensive plan need not be integrated into a single document, and the various parts need not have been enacted at the same time). Whether a zoning ordinance is "in accord with a comprehensive plan" has been held a question of fact. Love v. Board of County Comm'rs of Bingham County, 108 Idaho 728, 701 P.2d 1293 (1985) (governing body charged with zoning "in accord with a comprehensive plan" must make factual inquiry to determine whether requested ordinance or amendment reflects goals of, and takes into account the factors in, comprehensive plan in light of present factual circumstances; court should not overturn governing body's decision unless clearly erroneous). On the differing attitudes of various states as to what satisfies a "comprehensive plan" requirement for zoning, see Sullivan & Kressel, Twenty Years After: Renewed Significance of the Comprehensive Plan Requirement, 9 Urban L.Ann. 33 (1975). See generally Haar, "In Accordance with a Comprehensive Plan," 68 Harv.L.Rev. 1154 (1955), taking the view that the use of a comprehensive plan should be a separate requisite to the validity of zoning laws, not just a part of the "reasonableness" requirement. The author also advocates the requirement that such a comprehensive plan be evidenced by an actual "master plan," though he notes the courts' tendency not to require the latter. See also Sullivan, Report of the Subcommittee on the Plan as Law, 23 Urban Law. 845 (1991). For further discussion of the planning process in land use, see Chapter 21 *infra*, particularly Section 143, dealing with master plans. As to stabilization as a goal of zoning, see also Note, Potholes in the Motor City: How Vacant Properties and Neighborhood Stabilization Can Subject Detroit and Similarly Situated Municipalities to Liability, 47 New Eng. L. Rev. 714 (2013).

Note that typical "Euclidean zoning" is "cumulative" and thus achieves only a rather loose homogenizing of areas, since "higher uses" are allowed in a "lower use" zone—a residence, for instance, in a commercial or industrial zone. Some courts insist on such zoning. See Katobimar Realty Co. v. Webster, 20 N.J. 114, 118 A.2d

is thought to ensure that the zoning classifications will, at least in most instances, be free from arbitrariness or unreasonable discrimination.[48] It is because of the lack of conformity with a comprehensive plan that zoning is often struck down as "spot" or "piecemeal" zoning.[49] Such zoning is usually said to exist when small areas are given a different classification from that assigned neighboring parcels that are similarly situated.[50] It is invalid *if* arbitrary or otherwise unreasonable,[51] or if it was enacted mainly for the purpose of advancing certain private interests, not for the public good.[52]

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824 (1955) (shopping center could not be prohibited in industrial zone). But there is a tendency now to allow "non-cumulative zoning," in which even "lower-use zones" may also be exclusive, just as "higher-use zones" have traditionally been. See People ex rel. Skokie Town House Builders, Inc. v. Village of Morton Grove, 16 Ill.2d 183, 157 N.E.2d 33 (1959). See generally Madsen, Noncumulative Zoning in Illinois, 37 Chi.-Kent L.Rev. 108 (1960); Comment, Industrial Zoning to Exclude Higher Uses, 32 N.Y.U.L.Rev. 1261 (1957). On possible drawbacks to non-cumulative zoning, see Hills & Schleicher, The Steep Costs of Using Non-cumulative Zoning to Preserve Land for Urban Manufacturing, 77 U. Chi. L. Rev. 249 (2010), part of Symposium, Reassessing the State and Local Government Toolkit 77 U. Chi. L. Rev. 1–366 (2010). On trends in zoning laws, see also Section 18.3 *supra*.

[48] See Miller v. Town Planning Comm'n, 142 Conn. 265, 113 A.2d 504 (1955). Cf. Women's Kansas City St. Andrew Society v. Kansas City, 58 F.2d 593 (8th Cir.1932) (restriction against use of property as "old ladies' home" without special permission of zoning board; held void as not essential to general plan). See generally Mandelker, The Role of the Local Comprehensive Plan in Land Use Regulation, 74 Mich. L. Rev. 899 (1976). On the growing importance of the comprehensive plan over the years, see Sullivan & Pelham, The Evolving Role of the Comprehensive Plan, 29 Urban Law. 363 (1997). See also Section 21.3 *infra*.

[49] Chapman v. City of Troy, 241 Ala. 637, 4 So.2d 1 (1941); Whitelaw v. Denver City Council, 405 P. 3d 433 (Colo. App. 2017) (question in spot zoning cases is whether the change was made with purpose of furthering a comprehensive zoning plan or was designed merely to relieve restriction on a particular property); Guerriero v. Galasso, 144 Conn. 600, 136 A.2d 497 (1957); Neighbors for Preservation of Big and Little Creek Community v. Board of County Com'rs, 358 P. 3d 67 (Idaho 2015) (claim of spot zoning is essentially an argument that a change in zoning is not in accord with the comprehensive plan); Schadlick v. City of Concord, 108 N.H. 319, 234 A.2d 523 (1967) (spot zoning invalid if not in accord with comprehensive planning for good of community); Santmyers v. Town of Oyster Bay, 10 Misc.2d 614, 169 N.Y.S.2d 959 (Sup.Ct.1957); Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921). See Davis v. City of Omaha, 153 Neb. 460, 45 N.W.2d 172 (1950); Conlon v. Board of Public Works, 11 N.J. 363, 94 A.2d 660 (1953); Blumberg v. City of Yonkers, 21 A.D.2d 886, 251 N.Y.S.2d 750 (1964), motion gr. 15 N.Y.2d 547, 254 N.Y.S.2d 363, 202 N.E.2d 906. But it has been said that merely because statutes require that zoning be in accord with a comprehensive plan, the entire community does not have to be zoned all at once—authorities may begin by zoning only part of the locality. See Connell v. Town of Granby, 12 A.D.2d 177, 209 N.Y.S.2d 379 (1961) (some areas may be left open for future development and evolution but evidence must show that relationship of the part to the whole was considered; not shown here). See generally Citizen Advocates for a Livable Missoula, Inc. v. City Council, 331 Mont. 269, 130 P.3d 1259 (2006), listing the factors for determining whether "spot zoning" exists: (1) whether the requested use is significantly different from the prevailing use in the area, (2) whether the area that is differently zoned, or proposed for such different zoning, is small and looks to benefit a small number of persons, and (3) whether the zoning of the small area appears to be in the nature of special legislation, designed to benefit a few landowners at the expense of the surrounding landowners or the general public.

[50] Appeal of Mulac, 418 Pa. 207, 210 A.2d 275 (1965). See Cassel v. City of Baltimore, 195 Md. 348, 73 A.2d 486 (1950); Leahy v. Inspector of Buildings, 308 Mass. 128, 31 N.E.2d 436 (1941); Linden Methodist Episcopal Church v. City of Linden, 113 N.J.L. 188, 173 A. 593 (1934); Perkins v. Marion County, 252 Or. 313, 448 P.2d 374 (1968) (many persons in neighborhood had signed petition protesting the singling-out of a particular spot by the zoning ordinance); Appeal of Glorioso, 413 Pa. 194, 196 A.2d 668 (1964); Weaver v. Ham, 149 Tex. 309, 232 S.W.2d 704 (1950); Anderson v. City of Seattle, 64 Wn.2d 198, 390 P.2d 994 (1964). Cf. Lavitt v. Pierre, 152 Conn. 66, 203 A.2d 289 (1964) (inappropriate use of land must be provided by ordinance in order for invalid "spot zoning" to be found). See generally Reynolds, "Spot Zoning"—A Spot That Could Be Removed From the Law, 48 J. Urban & Contemp. L. 117 (1995), criticizing use of the term "spot zoning."

[51] See Eden v. Town Plan and Zoning Commission, 139 Conn. 59, 89 A.2d 746 (1952); Smith v. Board of Appeals, 313 Mass. 622, 48 N.E.2d 620 (1943) (67-foot wide strip designated "funeral home district" for benefit of one land-owner; held invalid "spot zoning"); Page v. City of Portland, 178 Or. 632, 165 P.2d 280 (1946); Salvitti v. Kennedy Township, 429 Pa. 330, 240 A.2d 534 (1968); Cleaver v. Board of Adjustment, 414 Pa. 367, 200 A.2d 408 (1964). Cf. Taco Bell v. City of Mission, 234 Kan. 879, 678 P.2d 133 (1984) (rezoning four fast-food restaurant properties to office use found arbitrary and capricious).

[52] Hermann v. City of Des Moines, 250 Iowa 1281, 97 N.W.2d 893 (1959); Thomas v. Town of Bedford, 11 N.Y.2d 428, 230 N.Y.S.2d 684, 184 N.E.2d 285 (1962); Appeal of Lieb, 179 Pa.Super. 318, 116 A.2d 860

(Note that "spot zoning" has become such a pejorative term that is often used to indicate invalidity—but the term as technically used means only a kind of zoning that is *potentially* invalid.) Sometimes, such zoning might be invalidated not only as in violation of due process because unreasonable or arbitrary, but also as in violation of equal protection. Clearly, zoning laws *can* be struck down if in violation of the equal protection clause of the U.S. Constitution and comparable state constitutional provisions. Mostly, these clauses have been utilized in situations where it is shown that certain activities are banned from a particular district while similar activities—not reasonably to be differentiated—are allowed in that district.[53] On the equal-protection basis and/or due

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(1955); Putney v. Township of Abington, 176 Pa.Super. 463, 108 A.2d 134 (1954). See Zandri v. Zoning Commission, 150 Conn. 646, 192 A.2d 876 (1963) (spot zoning may be result of effort to aid owner or owners of one small area); Guerriero v. Galasso, *supra* note 49 (spot zoning disturbs overall planning of neighborhood); McQuail v. Shell Oil Co., 40 Del.Ch. 396, 183 A.2d 572 (1962). Often, spot zoning has been invalidated in situations where a particular small area is given unreasonably *favorable* treatment, but invalidation can also occur if an area is singled-out for unreasonably *unfavorable* treatment. See Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 290 P.3d 691 (Mont. 2012) (both "spot zoning"—where the spot is treated favorably—and "reverse spot zoning"—where the spot is treated unfavorably—may be found illegal); Appeal of Glorioso, *supra* note 50. See generally Note, Spotty Behavior or Good Precedent: The Rebirth of the Inverse Spot Zoning Doctrine, 35 Seton Hall Legis. J. 516 (2011) ("inverse spot zoning" treats a particular property *less* favorably than other property in the area and can thus potentially be invalidated as discriminatory when challenged by the owner of the "spot"; most spot zoning cases deal with small areas that are treated more favorably than other properties in the area, thus causing neighbors to challenge the "spot"). Spot zoning has usually been invalidated in situations where a rather small area—such as a single city lot—has been treated differently from the surrounding neighborhood; such invalid zoning can be found even where a sizable tract is treated discriminatorily. See Wilcox v. City of Pittsburgh, 121 F.2d 835 (3d Cir.1941); Keppy v. Ehlers, 253 Iowa 1021, 115 N.W.2d 198 (1962) (zoning of twenty-acre tract invalidated); Evanns v. Gunn, 177 Misc. 85, 29 N.Y.S.2d 368 (1940), aff'd 262 App.Div. 865, 29 N.Y.S.2d 150. Cf. Reskin v. City of Northlake, 55 Ill.App.2d 184, 204 N.E.2d 600 (1965) (zoning of two lots). Conversely, zoning is not necessarily invalid spot zoning simply because a single small parcel is treated differently from the surrounding area. Bucholz v. City of Omaha, 174 Neb. 862, 120 N.W.2d 270 (1963). See Partain v. City of Brooklyn, 138 N.E.2d 180 (Ohio Com.Pl.1955), aff'd 101 Ohio App. 279, 133 N.E.2d 616 (1956); Pollock v. Zoning Board of Adjustment, 20 Pa.Cmwlth. 641, 342 A.2d 815 (1975) (rezoning of small area for use different from rest of neighborhood is not invalid if is in accord with comprehensive plan and is for reasonable purpose); Schubach v. Silver, 461 Pa. 366, 336 A.2d 328 (1975) (rezoning to permit nursing home on four-acre tract upheld). Indeed, it is sometime stated in general terms that different zoning classifications for small tracts *are* valid if the zoning is in accord with an overall plan and is directed primarily at the public good, not private advantage. See Penn v. Metropolitan Plan Comm'n, 141 Ind.App. 387, 228 N.E.2d 25 (1967); Kozesnik v. Montgomery Township, 24 N.J. 154, 131 A.2d 1 (1957) (zoning not necessarily invalid because private interests are incidentally benefited thereby); Twenty-One White Plains Corp. v. Village of Hastings-on-Hudson, 14 Misc.2d 800, 180 N.Y.S.2d 13 (Sup.Ct.1958), aff'd 9 A.D.2d 934, 196 N.Y.S.2d 562. But see Mandelker, Spot Zoning: New Ideas for an Old Problem, 48 Urban Law. 737 (2016), commenting (at 742) that courts sometimes consider spot zoning to be presumptively arbitrary.

[53] Village of University Heights v. Cleveland Jewish Orphan's Home, 20 F.2d 743 (6th Cir.1927), cert. denied 275 U.S. 569, 48 S.Ct. 141, 72 L.Ed. 431; Miami Beach v. State ex rel. Lear, 128 Fla. 750, 175 So. 537 (1937); Catholic Bishop of Chicago v. Kingery, 371 Ill. 257, 20 N.E.2d 583 (1939); James S. Holden Co. v. Connor, 257 Mich. 580, 241 N.W. 915 (1932). See City of Chicago v. Sachs, 1 Ill.2d 342, 115 N.E.2d 762 (1953). Some cases have also found a violation of equal protection in situations where zoning has been administered by a local government for spiteful reasons, or out of ill will, rather than for any proper purpose. See Wilson, Nasty Motives Visit the Supreme Court: A Consideration of Recent Land-Use Damages Cases, 32 Urban Law. 787 (2000).

On the increased tendency of landowners to sue for damages, often successfully, where a municipality violates equal protection and/or due process in its treatment of plaintiff's land, see Wilson, When Sending Flowers Is Not Enough: Development in Landowner Civil Rights Lawsuits Against Municipal Officials, 34 Urban Law. 981 (2002), noting (at 981–82) the importance of Village of Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), in allowing equal protection claims, but also noting (at 982–91) that municipalities have done surprisingly well at defending against equal protection claims, while (at 991–94) landowners have done surprisingly well under due process claims. In Village of Willowbrook v. Olech, *supra*, a claim for relief under traditional equal protection analysis was found to be stated by a property owner's allegation that a village had engaged in arbitrary and capricious action in zoning his property differently from its zoning of similarly situated land. The Supreme Court, however, did not reach the question involving the

process grounds, zoning ordinances can be struck down where they lack uniformity in application *within* a particular district—as where public garages are allowed in parts of a district but not in all.[54] Such discrimination obviously defeats the purpose of homogenizing of areas. But as with other "spot zoning," it seems the lack of uniformity within a district is invalid only if *not* based on relevant differences among the parts of the area that are treated differently.[55]

A third legitimate purpose of zoning is the limiting of density of population. Though a community has an obvious interest in preventing over-crowding and in limiting population growth so that it will not overwhelm the community's ability to offer needed services to its residents, zoning aimed, partly or entirely, at controlling population has been a subject of much controversy. It has been called "snob" or "exclusionary" zoning. It often has taken the form of requirements in residential areas that lots, or floor space of homes, have a designated minimum size. In practice, it is alleged to have frequently excluded certain racial and/or economic groups from many communities.[56] Occasionally

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alternative theory that the village had acted out of subjective ill will, which had been the basis of the Seventh Circuit's granting relief for violation of equal protection. Olech v. Village of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998), aff'd 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). See generally Tassinary, Jourdan & Parsons, Equal Protection and Aesthetic Zoning: A Possible Crack and a Preemptive Repair, 42 Urban Law. 375, 377–78 (2010).

[54] Henry v. White, 194 Tenn. 192, 250 S.W.2d 70 (1952). See Clements v. McCabe, 210 Mich. 207, 177 N.W. 722 (1920); Raskin v. Morristown, 21 N.J. 180, 121 A.2d 378 (1956); Olean v. Conkling, 157 Misc. 63, 283 N.Y.S. 66 (1935); Blankenship v. City of Richmond, 188 Va. 97, 49 S.E.2d 321 (1948). Often, the requirement of uniformity within a district is found in enabling state legislation on the municipal zoning power; but the requirement may be considered basic to all zoning. See Schmidt v. Board of Adjustment, 9 N.J. 405, 88 A.2d 607 (1952). A lack of uniformity, possibly violating equal protection, can also be found where large businesses and small businesses are treating differently within the same zone; but a reasonable basis for the differentiation is generally sufficient for it to be upheld. See Hernandez v. City of Hanford, 41 Cal.4th 279, 59 Cal.Rptr.3d 442, 159 P.3d 33 (2007) (equal protection challenge to city's zoning ordinance that allowed department stores with 50,000 or more square feet of floor space to sell furniture in specific commercial district, while denying that right to smaller retailers, was subject to rational relationship or rational basis standard of judicial review; ordinance upheld).

[55] Borough of West Caldwell v. Zell, 22 N.J.Super. 188, 91 A.2d 763 (1952). Cf. Bogert v. Washington Township, 25 N.J. 57, 135 A.2d 1 (1957) (uniformity is ultimate end of zoning; too great an amount of nonconformance will make area less attractive).

[56] Boudreaux, Lotting Large: The Phenomenon of Minimum Lot Size Laws, 68 Me. L. Rev. 1 (2016); see Marcus, Exclusionary Zoning: The Need for a Regional Planning Context,16 N.Y.L.F. 732 (1970); Note, Exclusionary Zoning and Equal Protection, 84 Harv. L.Rev. 1645 (1971); "Battle to Open the Suburbs: New Attack on Zoning Laws," U.S. News & World Rep., June 22, 1970, at 39. Compare Papke, Keeping the Underclass in Its Place: Zoning the Poor, and Residential Segregation, 41 Urban Law. 787 (2009). Cf. Gallese, Housing for the Poor Blocked Despite Curb on "Snob Zoning" Laws, Wall St. J., Oct. 17, 1972, at 1 (describing efforts—not always successful—to circumvent "snob zoning" laws in order to establish low- and moderate-income housing, and housing for the elderly, in some areas). See generally Kushner, Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Segregation in the United States (Carrollton Press 1980); Jorgensen, Tearing Down the Walls: The Federal Challenge to Exclusionary Land Use Laws, 13 Urban Lawyer 201 (1981); Lewyn and Schechtman, No Parking Anytime: The Legality and Wisdom of Maximum Parking and Minimum Density Requirements, 54 Washburn L.J. 285 (2015); Annot., Validity of Zoning Regulations Prescribing Minimum Area for House Lots or Requiring an Area Proportionate to Number of Families to be Housed, 95 A.L.R.2d 716 (1964). Compare Howard, The Unified Development Ordinance: Commonality in Zoning Regulations, Disparate Treatment of Citizens, 38 U. LaVerne L. Rev. 178 (2017). See also Freilich & Bass, Exclusionary Zoning: Suggested Litigation Approaches, 3 Urban Lawyer 344 (1971); Yannacone, Rahenkamp & Cerchione, Impact Zoning: Alternative to Exclusion in the Suburbs, 8 Urban Lawyer 417 (1976), urging zoning that takes into account regional demands and the prospects of local growth. On planning for future growth, see generally Chapter 21 *supra*.

On the *legitimate* use of zoning to control population density, see Hukle v. Kansas City, 212 Kan. 627, 512 P.2d 457 (1973) (city could deny rezoning for townhouse complex that would put burden on city services). As to using zoning to provide economically diverse neighborhoods, see Chau and Yager, Zoning for Affordability: Using the Case of New York to Explore Whether Zoning Can Be Used to Achieve Income-Diverse Neighborhoods, 25 N.Y.U. Envtl. L.J. 52 (2017).

zoning is invalidated if its aim is the exclusion of a particular group of persons, such as children.[57] But the Supreme Court has refused to infer discriminatory intent against racial minorities from mere refusal to rezone property to allow a low-cost housing project therein.[58] Generally, minimum-lot-size restrictions have been upheld as having a

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[57] See Molino v. Borough of Glassboro, 116 N.J.Super. 195, 281 A.2d 401 (1971), invalidating an ordinance which required that in any particular garden-apartment-complex, at least 70% of all the units must have not more than one bedroom, no more than 25% could have two bedrooms, and no more than 5% could have 3 bedrooms. The provision was admittedly designed to keep children out of the community and thus lower taxes, since fewer schools would be required. Cf. Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971) (invalidating ordinance prohibiting "group rentals" of seashore residences). See also State ex rel. Thelen v. City of Missoula, 168 Mont. 375, 543 P.2d 173 (1975) (state law providing that homes for the *disabled* must be allowed in all residential areas governed over any local zoning laws to the contrary).

Many landlords refuse to rent to persons who have children living with them, but a few states and a number of cities now have bans on such discrimination. See "No Children Allowed," Parade magazine, Oct. 5, 1980, at 21. On the constitutionality of laws proscribing age discrimination in housing, see Metropolitan Dade County Fair Housing & Employment Appeals Bd. v. Sunrise Village Mobile Home Park, 511 So.2d 962 (Fla.1987), noted 17 Stetson L. Rev. 915 (1988), upholding a county's power to enact such a law but holding unconstitutional an ordinance that authorized awards of damages for humiliation, embarrassment, and mental distress.

Amendments to the federal Fair Housing Act, which were passed in 1988 and took effect in 1989, forbid discrimination against persons with children in the selling and leasing of most housing. Exceptions are provided for retirement or "adults only" communities. Eighty per cent of the units in a complex must contain at least one occupant who is 55 years of age or older in order for the complex to qualify for the exemption. In addition, facilities or services specifically designed to meet the needs of older persons must be provided, and the complex must publish and adhere to policies showing an intent to provide housing for those 55 or older. 42 U.S.C.A. §§ 3601–17, 3631 (1988). See Brooks, New Law Likely to Have a Major Impact on Condos, N.Y. Times, Jan. 15, 1989, at 29; Coan & Salmon, The Fair Housing Act and Seniors' Housing, 27 Urban Law. 826 (1995). See generally Lewin, Children as Neighbors? Elderly Bar the Door, N.Y. Times, Nov. 28, 1989, at 1; Note, The Enforceability of Age Restrictive Covenants in Condominium Developments, 54 S. Cal. L. Rev. 1397 (1981). See also Dwyer, No Place for Children: Addressing Urban Plight and Its Impact on Children Through Child Protection Law, Domestic Relations Law, and "Adult-only" Residential Zoning, 62 Ala. L. Rev. 887 (2011).

Historically, retirement or "adult," communities have often been successful in excluding, or limiting the number of, younger residents—through the use of zoning, restrictive covenants, and/or exclusionary marketing policies. See Doyle, Retirement Communities: The Nature and Enforceability of Residential Segregation by Age, 76 Mich.L.Rev. 64 (1977) (trend is to uphold age-restrictive zoning by such communities). Cf. Comment, Neither Seen Nor Heard: Keeping Children Out of Arizona's Adult Communities under Arizona Revised Statutes Section 33–1317B, 1975 Ariz.St. L.J. 813. See generally Note, Housing Discrimination Against Children: The Legal Status of a Growing Social Problem, 16 J.Family L. 559 (1978). See also Brown, Housing for the Elderly: Federal Subsidy Policy and Its Effect on Age-Group Isolation, 57 U.Detroit J. Urban L. 257 (1980). On the history and development of Sun City, Arizona, the first major retirement community, see Loh, Sun City—The Next Generation, Arizona (Tucson) Daily Star, May 29, 1990, at C-1. On the changing nature of retirement communities because of the increasing youthfulness of many retirees, see Kadlec, Farewell to Bingo, Time magazine, Nov. 26, 2007, at 56. As to zoning practices and policies relating to nursing homes for the elderly, see Hoffman & Landon, Zoning and the Aging Population: Are Residential Communities Zoning Elder Care Out?, 44 Urban Law. 629 (2012).

Minimum-age restrictions for retirement communities or districts will be upheld against equal-protection attack if the restrictions are supported by a *rational purpose;* unlike the situation with racial discrimination, a compelling state interest need not be found. See Taxpayers Association v. Weymouth Township, 80 N.J. 6, 364 A.2d 1016 (1976), cert. denied 430 U.S. 977, 97 S.Ct. 1672, 52 L.Ed.2d 373 (ordinance limited occupancy of mobile home parks to those 52 and over, and those over 18 who belonged to a family the head of which—or whose spouse—was 52 or over; upheld); Shepard v. Woodland Township Committee and Planning Board, 71 N.J. 230, 364 A.2d 1005 (1976) (senior citizen communities authorized as special uses; persons under 52 mostly excluded; upheld); Maldini v. Ambro, 36 N.Y.2d 481, 369 N.Y.S.2d 385, 330 N.E.2d 403 (1975), appeal dism'd 423 U.S. 993, 96 S.Ct. 419, 46 L.Ed.2d 367 (town created "retirement community district" for subsidized housing for the elderly; sustained). Cf. Riley v. Stoves, 22 Ariz.App. 223, 526 P.2d 747 (1974) (portion of mobile-home subdivision set aside for persons 21 and older; no violation of equal protection).

[58] Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (no discriminatory intent shown, though had discriminatory effect). The case was then remanded to the Court of Appeals to determine whether the village's refusal to rezone violated the Fair Housing Act, 42 U.S.C.A. §§ 3601–31. That court held the village did have a *statutory* obligation to refrain from zoning policies that effectively foreclosed any low-cost housing within its boundaries, and the case was

reasonable relationship to public health, safety, and/or general welfare.[59] Minimums as large as ten acres have been sustained.[60] But there are also now a number of cases

remanded to the district court for a determination of whether the defendant had done so. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir.1977), cert. denied 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978). The court of appeals listed various factors to be examined in determining possible violations of the Fair Housing Act; 558 F.2d 1283, 1290–93 (7th Cir.1977). See, adopting similar standards, United States v. City of Black Jack, 508 F.2d 1179 (8th Cir.1974), cert. denied 422 U.S. 1042, 95 S.Ct. 2656, 45 L.Ed.2d 694, reh. denied 423 U.S. 884, 96 S.Ct. 158, 46 L.Ed.2d 115 (1975) (statutory violation found in incorporation of community, followed by rezoning so as to exclude subsidized housing project); Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir.1973). Cf. Town of Huntington v. Huntington Branch, N.A.A.C.P., 488 U.S. 15, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988), reh. denied 488 U.S. 1023, 109 S.Ct. 824, 102 L.Ed.2d 813, where the Court found that a town's refusal to amend its zoning ordinance, which restricted private multifamily housing projects to a largely minority urban renewal area, was a violation of the Fair Housing Act; the sole justification offered—that the ordinance encouraged developers to invest in a deteriorated and needy section of town—was found inadequate. But cf. Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir.1975), vacated and remanded 429 U.S. 1068, 97 S.Ct. 800, 50 L.Ed.2d 786, aff'd on remand 558 F.2d 350 (6th Cir.) (refusal to rezone to permit low-income housing found not to discriminate against minorities). See generally American Bar Ass'n Advisory Comm'n on Housing & Urban Growth, Housing for All Under Law (1977); Moskowitz, Exclusionary Zoning Litigation (Ballinger Publ.1977); Hyson, The Problem of Relief in Developer-Initiated Exclusionary Zoning Litigation, 12 Urban L.Ann. 21 (1976); Mandelker, Racial Discrimination and Exclusionary Zoning: A Perspective on *Arlington Heights*, 55 Tex.L.Rev. 1217 (1977); Sussna, Remedying Exclusionary Zoning Practices in Suburbia, 28 U.Fla.L.Rev. 671 (1976). See also Kmiec, Exclusionary Zoning and Purposeful Racial Segregation in Housing: Two Wrongs Deserving Separate Remedies, 18 Urban Law. 393 (1986), stating that racially motivated exclusionary zoning can be rectified under the federal Constitution and Fair Housing Act but concluding that enactment of a Proposed Model State Land Use Enabling Statute (set forth at *id.* 420–22) by the states is needed to put an end to exclusionary zoning that is *not* racially motivated; Note, Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing, 78 Va. L. Rev. 535 (1992).

Blacks and other minority groups do now live, of course, in many suburbs; but few suburbs are truly integrated, with a mixture of races. Many suburbs in which blacks reside in considerable numbers are, for instance, spillovers from older ghettos or enclaves into areas abandoned by whites. See H. Rose, Black Suburbanization (1976). See generally Connolly, Black Movement into the Suburbs, 9 Urban Aff.Q.91 (1973). See also Comment, Breaking the Color Line: Zoning and Opportunity in America's Metropolitan Areas, 8 J. Gender Race & Just. 667 (2005).

On the use of "fair housing laws"—at the federal, state, and local level—to "open up" communities to all racial and ethnic groups, see Chapter 27 *infra*. Cf. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979) (area residents and village alleged that real-estate brokers and sales personnel "steered" prospective home buyers to different residential areas according to race; village and individual residents of described area held to have standing to complain under Fair Housing Act and Civil Rights Act of 1866).

[59] See Clemons v. City of Los Angeles, 36 Cal.2d 95, 222 P.2d 439 (1950) (minimum of 5000 square feet); Chucta v. Planning and Zoning Comm'n of Seymour, 154 Conn. 393, 225 A.2d 822 (1967); First National Bank of Skokie v. City of Chicago, 25 Ill.2d 366, 185 N.E.2d 181 (1962); J. D. Construction Corp. v. Township of Freehold, 119 N.J.Super. 140, 290 A.2d 452 (1972) (control of population density specifically said to be a valid zoning objective); State v. Gallop Building, 103 N.J.Super. 367, 247 A.2d 350 (1968); Clary v. Eatontown, 41 N.J.Super. 47, 124 A.2d 54 (1956) (minimum of 20,000 square feet upheld); Fulling v. Palumbo, 21 N.Y.2d 30, 286 N.Y.S.2d 249, 233 N.E.2d 272 (1967) (is legitimate interest in preserving character of area and in preventing too great a density for municipal facilities to handle). See generally Symposium, Exclusionary Zoning, 22 Syracuse L.Rev. 465 (1971); Annot., Construction and Application of Zoning Laws Setting Minimum Lot Size Requirements, 2 A.L.R. 5th 553 (1992); Annot., Exclusionary Zoning, 48 A.L.R.3d 1210 (1973). Minimums for the front-width of residential properties are also sometimes established by zoning ordinances, and these have also been sustained if reasonable. See Di Salle v. Giggal, 128 Colo. 208, 261 P.2d 499 (1953); Bilbar Construction Co. v. Board of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958) (150 feet). See generally Annot., Validity and Construction of Zoning Regulations Prescribing a Minimum Width or Frontage for Residence Lots, 96 A.L.R.2d 1367 (1964). The concern for assuring adequacy of municipal services prior to allowing population growth has also led some communities to adopt limits on building permits for new residential construction, to require the developers to wait a certain length of time and/or themselves provide certain public services before constructing or expanding residential subdivisions, etc. ("timed" or "sequential" growth); see Chapter 21 *infra*.

[60] Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951) (minimum of ten acres in one class of residential zone). Cf. Rubi v. 49'er Country Club Estates, 7 Ariz.App. 408, 440 P.2d 44 (1968) (one acre); De Mars v. Zoning Commission, 142 Conn. 580, 115 A.2d 653 (1955) (increase in minimum dimensions

striking down such minimums, usually on the ground they are unreasonably large to achieve the supposed purposes;[61] and there is some evidence that courts are becoming increasingly unfavorable to this type of restriction.[62] Similarly, minimum-floor-space requirements for residences in particular areas have often been sustained as reasonably related to public health or other police-power purposes.[63] But there has been much

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of lots challenged; upheld); Honeck v. Cook County, 12 Ill.2d 257, 146 N.E.2d 35 (1957) (5 acres); County Com'rs of Queen Anne's County v. Miles, 246 Md. 355, 228 A.2d 450 (1967) (five acres); Fischer v. Bedminster Township, 11 N.J. 194, 93 A.2d 378 (1952) (five acres); Levitt v. Incorporated Village of Sands Point, 6 N.Y.2d 269, 189 N.Y.S.2d 212, 160 N.E.2d 501 (1959) (two acres); Franmor Realty Corp. v. Village of Old Westbury, 280 App.Div. 945, 116 N.Y.S.2d 68 (1952) (two acres); State ex rel. Grant v. Kiefaber, 114 Ohio App. 279, 181 N.E.2d 905 (1960), aff'd 171 Ohio St. 326, 170 N.E.2d 848 (80,000 square feet); Jones v. Woodway, 70 Wn.2d 977, 425 P.2d 904 (1967) (one acre). In Flora Realty & Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1952), a minimum-lot-size of three acres was upheld, and the U.S. Supreme Court dismissed an appeal for want of a substantial federal question. 344 U.S. 802, 73 S.Ct. 41, 97 L.Ed. 626 (1952).

[61] See Hamer v. Town of Ross, 59 Cal.2d 776, 31 Cal.Rptr. 335, 382 P.2d 375 (1963) (one acre); Cherry Hills Village v. Trans-Robles Corp., 181 Colo. 356, 509 P.2d 797 (1973) (2½ acres); Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964) (100,000 square feet); Christine Building Co. v. City of Troy, 367 Mich. 508, 116 N.W.2d 816 (1962) (21,780 square feet); Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970) (two acres); National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) (four acres). Cf. Morris v. City of Los Angeles, 116 Cal.App.2d 856, 254 P.2d 935 (Dist.Ct. 1953) (other houses in area were on smaller lots and thus restriction inappropriate; zoning regulation said to have come 50 years too late). There is also the possibility that if the allowed density is reduced, as by increasing the minimum lot size (or wherever the law is changed so that only less intense uses are now allowed—for instance, only residential uses where commercial used to be permitted), a property-owner may have an action for "taking" or "inverse condemnation," or may be able to have the change in the law declared invalid. But courts tend to apply the same standard of reasonableness to such changes as they apply to the original law—and thus most such changes have been upheld, and no relief granted. See Williamson, Constitutional and Judicial Limitations on the Community's Power to Downzone, 12 Urban Lawyer 157 (1980). (Changes that reduce the allowed density or intensiveness of use are often called "downzoning.") On "takings" and "inverse condemnation," see generally Chapter 19 *infra*. Relief under the Federal Civil Rights Act, 42 U.S.C. § 1983 (1974), is also a possibility where minimum-lot requirements are increased. This was recognized in Steel Hill Development, Inc. v. Sanbornton, 335 F.Supp. 947 (D.N.H. 1971); but in a subsequent proceeding, the court held the amendments, and minimum sizes thus established, not so unreasonable or arbitrary as to deprive plaintiffs of constitutional rights. 338 F.Supp. 301 (D.N.H. 1972), aff'd 469 F.2d 956 (1st Cir.). See generally Annot., Right of Real Property Owner to Relief Under Federal Civil Rights Acts Against Amendment of Zoning Ordinance Increasing Minimum Lot Requirements, 25 A.L.R. Fed. 850 (1975); Annot., Rezoning or Amendment of Zoning Regulations as Affecting Persons Who Have Purchased or Improved Property in Reliance Upon Original Regulations, 138 A.L.R. 500 (1942). See also Annot., Purchaser of Real Property as Precluded from Attacking Validity of Zoning Regulations Existing at the Time of the Purchase and Affecting the Purchased Property, 17 A.L.R.3d 743 (1968). On the use of large minimum-lot-size restrictions to preserve rural environments, see Note, Protection of Environmental Quality in Nonmetropolitan Regions by Limiting Development, 57 Iowa L.Rev. 126 (1971).

[62] See Appeal of Kit-Mar Builders, *supra* note 58; National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965), both rejecting minimum-lot-size restrictions and other exclusionary zoning in fairly general terms; Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 Stan.L.Rev. 767 (1969). See generally Note, Removing the Bar of Exclusionary Zoning to a Decent Home, 32 Ohio State L.J. 373 (1971). See also Haar, Housing the Poor in Suburbia (Ballinger Publ.1974).

[63] Hitchman v. Oakland Township, 329 Mich. 331, 45 N.W.2d 306 (1951); Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N.W.2d 634 (1944) (1000 square feet for one-story dwellings; 1200 for more-than-one-story dwelling); Lionshead Lake, Inc. v. Wayne Township, 10 N.J. 165, 89 A.2d 693 (1952), appeal dism'd 344 U.S. 919, 73 S.Ct. 386, 97 L.Ed. 708 (the leading case; sustained ordinance requiring 786 square feet for one-story residence, 1000 square feet for two-story dwellings with attached garages, 1200 square feet for two-story residences without attached garages). See Flower Hill Building Corp. v. Village of Flower Hill, 199 Misc. 344, 100 N.Y.S.2d 903 (1950) (minimum of 1800 square feet not invalid on its face); Thompson v. City of Carrollton, 211 S.W.2d 970 (Tex.Civ.App. 1948) (900 square-foot minimum in certain district sustained). Cf. Harris v. State ex rel. Ball, 23 Ohio App. 33, 155 N.E. 166 (1926) (set-back line of 25 feet from street for residences upheld). But cf. Comer v. City of Dearborn, 342 Mich. 471, 70 N.W.2d 813 (1955) (minimum floor area of 640 square feet in each unit of multiple dwelling invalid as applied to motel). See generally McCrory, The Undersized House: A Municipal Problem, 27 Chi.-Kent L.Rev. 142 (1948); Note, Municipal Corporations—Zoning—Validity of Minimum Floor Space Requirements, 21 Geo.Wash.L.Rev. 500 (1953); Annot., Validity and Construction of Zoning Laws Setting Minimum Requirements for Floorspace or Cubic Footage Inside Residence, 87 A.L.R. 4th 294 (1991). For analysis of the *Wayne Township* case, *supra*, see Haar, Wayne

discussion, and increasing controversy, about them;[64] and some have been invalidated as unreasonably small, or as simply not sufficiently related to the alleged objectives.[65]

Another type of "exclusionary" zoning is that in which only single-family residences are permitted in a particular zone. This type of provision has usually been upheld,[66] and the U.S. Supreme Court has even sustained the zoning of an entire (though small) village for one-family dwellings, to the exclusion of apartment houses, boarding houses, etc.[67]

Township: Zoning for Whom?—In Brief Reply, 67 Harv.L.Rev. 986 (1954); Haar, Zoning for Minimum Standards: The Wayne Township Case, 66 Harv.L.Rev. 1051 (1953).

[64] See Nolan & Horack, How Small a House?—Zoning for Minimum Space Requirements, 67 Harv.L.Rev. 967 (1954); Note, Constitutional Law—Equal Protection—Zoning—Snob Zoning: Must a Man's Home Be a Castle?, 69 Mich.L.Rev. 339 (1970). See generally Williams & Wacks, Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited, 1969 Wis.L.Rev. 827. See also Clark, Blacks in Suburbs: A National Perspective (Center for Urban Policy Research 1979). Because of limited space and high costs of land, planners in some cities now try to increase, rather than limit, the density of population in residential areas. See Wentling & Bookout (eds.), Density by Design (Urban Land Institute 1988), reviewed 25 Urban Law. 693 (1993).

[65] See Senefsky v. Lawler, 307 Mich. 728, 12 N.W.2d 387 (1943); Appeal of Medinger, 377 Pa. 217, 104 A.2d 118 (1954) (1000 square feet required in some areas, 1800 in others; if 1000 square-foot dwellings don't impair health in some areas, why require 1800 square feet in other areas?). Cf. City of North Miami v. Newsome, 203 So.2d 634 (Fla.App.1967) (unreasonable as to business premises); Comer v. City of Dearborn, *supra* note 63 (usual restriction for multiple dwellings invalid as applied to motel); Ridgeview Co. v. Board of Adjustment, 57 N.J.Super. 142, 154 A.2d 23 (1959) (unreasonable as to business premises); Frischkorn Construction Co. v. Lambert, 315 Mich. 556, 24 N.W.2d 209 (1946) (house met square footage requirement but not cubic foot requirement; ordinance held invalid).

[66] See Wilcox v. City of Pittsburgh, 121 F.2d 835 (3d Cir.1941); Koch v. City of Toledo, 37 F.2d 336 (6th Cir.1930); City of Miami Beach v. Lachman, 71 So.2d 148 (Fla.1953) appeal dism'd 348 U.S. 906, 75 S.Ct. 292, 99 L.Ed. 711; Jacobson v. Wilmette, 403 Ill. 250, 85 N.E.2d 753 (1949); Antrim v. Hohlt, 122 Ind.App. 681, 108 N.E.2d 197 (1952); Leigh v. City of Wichita, 148 Kan. 607, 83 P.2d 644 (1938) (apartment house enjoined as in violation of zoning, which was for one- and two- family dwellings; city not estopped by prior failure to enforce); Brett v. Building Commissioner, 250 Mass. 73, 145 N.E. 269 (1924); Pascack Association, Ltd. v. Mayor and Council, 74 N.J. 470, 379 A.2d 6 (1977); Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958); Repp v. Shahadi, 132 N.J.L. 24, 38 A.2d 284 (1944). But see Britton v. Town of Chester, 134 N.H. 434, 595 A.2d 492 (1991) (town ordinance severely restricting multifamily housing held contrary to state's zoning enabling statute, the court finding that the welfare of the entire affected region must be considered in determining whether the law promoted valid police-power purposes); Dowsey v. Village of Kensington, 257 N.Y. 221, 177 N.E. 427 (1931) (village contiguous to big city zoned all property almost exclusively for one-family-dwelling use; unreasonable as to property just within village boundary and fronting on a main highway). On power to *change* single-family zoning to less restrictive zoning, see Note, Zoning—Municipal Corporations—Due Process—Restrictions on the Power to Change Zoning Ordinances, 8 U.Pitt.L.Rev. 69 (1941). See generally Boyd, Zoning for Apartments: A Study of the Role of Law in the Control of Apartment Houses in New Haven, Connecticut 1912–32, 33 Pace L. Rev. 600 (2013); Annot., Supreme Court's Views as to Constitutionality of Residential Zoning Restrictions, 52 L.Ed.2d 863 (1978). See also Annot., Use of Property for Multiple Dwellings as Violating Restrictive Covenant Permitting Property to Be Used for Residential Purposes Only, 99 A.L.R.3d 985 (1980); Annot., Change of Neighborhood as Affecting Restrictive Covenants Precluding Use of Land for Multiple Dwelling, 53 A.L.R.3d 492 (1973).

[67] Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). See Note, Zoning—Equal Protection—Right of Privacy, 60 Corn.L.Rev. 299 (1975); Comment, Boraas: A Warning to Industry and Land Developers, 12 Houston L.Rev. 253 (1974); Note, Constitutional Law—Zoning, 19 Vill.L.Rev. 819 (1974); Comment, Property: Zoning and the Rational Basis Test: Foundation for New Use of an Old Power, 14 Washburn L.J. 182 (1975); "New Privacy Problems," Time, April 15, 1974, at 104. Cf. Guaclides v. Borough of Englewood Cliffs, 11 N.J.Super. 405, 78 A.2d 435 (1951) (ordinance upheld despite its practically excluding multiple-family dwellings from borough); Fountain Gate Ministries v. City of Plano, 654 S.W.2d 841 (Tex.App. 1983) (operation of college enjoined as in violation of single-family zoning ordinances; court stated that operation of college is not protected as a First Amendment exercise of speech or religion). Though the U.S. Supreme Court in the *Belle Terre* case *supra* sustained a restriction against more than two unrelated persons living together, a number of state courts have invalidated such limitation. While the U.S. Supreme Court required only a "rational purpose" in order for such law to pass Equal Protection muster, some of these state tribunals have, due to the restriction on freedom of association, applied a stricter test and required a substantial relationship to a state objective. Other state court cases have simply distinguished *Belle Terre* on the ground that the group of unrelated persons there involved—6 college students—did not in any real sense

But the Supreme Court has struck down as violative of due process an ordinance limiting occupancy of a dwelling to a "single family" and then very *narrowly* defining what constitutes such a "family."[68] And some state courts have now found a duty in

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constitute a single housekeeping unit but were merely temporarily residing together. See Annot., Validity of Ordinance Restricting Number of Unrelated Persons Who Can Live Together in Residential Zone, 12 A.L.R. 4th 238 (1982). Even applying a "rational purpose" test, a state court may invalidate a restriction on related persons living together as violative of Due Process under the *state* constitution. See Charter Township of Delta v. Dinolfo, 419 Mich. 253, 351 N.W.2d 831 (1984) (ordinance not reasonably related to legitimate objective of maintaining residential nature of neighborhood). But see City of Ladue v. Horn, 720 S.W.2d 745 (Mo.App.1986) (zoning designating certain zones as "one family residential" could validly prevent an unmarried man and woman from living together; held rationally related to police power purposes). Cf. Zavala v. City of County of Denver, 759 P.2d 664 (Colo. 1988) (unmarried, unrelated homeowners failed to establish discriminatory enforcement of ordinance restricting use to single-family dwellings and failed to establish violation of due process or equal protection). See generally Frame & Scorza, Village of Belle Terre v. Boraas: Property Rights, Personal Rights and The Liberal Regime, 2 Hast.Con.L.Q.935 (1975); Oliveri, Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions, 67 Fla. L. Rev. 1401 (2015); Note, *Belle Terre* and Single-Family Home Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity, 74 N.Y.U. L. Rev. 447 (1999). Local governments have sometimes temporarily lifted bans on multiple-family dwellings, or have granted variances, because of housing shortages; such relief has usually been upheld. See Lamarre v. Commissioner of Public Works, 324 Mass. 542, 87 N.E.2d 211 (1949); Hendlin v. Fairmount Construction Co., 8 N.J.Super. 310, 72 A.2d 541 (1950); Gedney v. City of White Plains, 99 N.Y.S.2d 111 (Sup.Ct. 1950). Cf. City of Miami Beach v. First Trust Co., 45 So.2d 681 (Fla.1949) (court ordered zoning restrictions removed because of changed conditions). But see Polk v. Axton, 306 Ky. 498, 208 S.W.2d 497 (1948); Clifton Hills Realty Co. v. City of Cincinnati, 60 Ohio App. 443, 21 N.E.2d 993 (1938). See generally Comment, The Effect of the Housing Shortage on the Single-Family Residential Zone, 46 Ill.L.Rev. 745 (1951). See also Babcock & Bosselman, Suburban Zoning and the Apartment Boom, 111 U.Pa.L.Rev. 1040 (1963); Note, The Battle for Apartments in Benign Suburbia: A Case of Judicial Lethargy, 59 Nw. U.L.Rev. 345 (1964).

The *Village of Belle Terre* case, *supra*, was cited with approval in Sustainable Growth Initiative Committee v. Jumpers, LLC, 122 Nev. 53, 128 P.3d 452 (2006), where the court held that material issues of fact precluded summary judgment as to the validity of a county's sustainable growth initiative. The court recognized that, as the Court in *Belle Terre* said, the police power is not limited to the elimination of filth, stench and unhealthy conditions but includes the promotion of family values, youth values, and the advantages of quiet seclusion and clear air. *Id.* at 466, quoting *Belle Terre*, 416 U.S. at 9, 94 S.Ct. at 1536, 39 L.Ed.2d at 804.

[68] Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (would have been crime under ordinance for homeowner to have living with her a son and grandson, plus second grandson who was cousin of first). See City of Santa Barbara v. Adamson, 27 Cal.3d 123, 164 Cal.Rptr. 539, 610 P.2d 436 (1980) (invalidating ordinance creating single-family zone and defining "family" as individual, or 2 or more persons related by blood, marriage, or adoption living together as single housekeeping unit, or group of not more than 5 persons living together as single unit—discriminated against groups of more than 5 unrelated persons); Incorporated Village of Freeport v. Association for the Help of Retarded Children, 94 Misc.2d 1048, 406 N.Y.S.2d 221 (1977), aff'd 60 A.D.2d 644, 400 N.Y.S.2d 724 (zoning regulation limited a district to single-family units and defined "family" as only including persons related by blood, marriage, or adoption; invalid as applied to residence in which 8 mentally retarded persons lived with house-parents); City of White Plains v. Ferraioli, 34 N.Y.2d 300, 357 N.Y.S.2d 449, 313 N.E.2d 756 (1974). Compare Saunders v. Clark County Zoning Department, 66 Ohio St.2d 259, 421 N.E.2d 152 (1981) (family-based, group foster home could constitute "family"), with Garcia v. Siffrin Residential Association, 63 Ohio St.2d 259, 407 N.E.2d 1369 (1980) (8 or fewer mentally retarded persons not "family"). Cf. Costley v. Caromin House, Inc., 313 N.W.2d 21 (Minn.1981) (group home for 6 retarded adults and 2 house parents was single-family unit); State ex rel. Ellis v. Liddle, 520 S.W.2d 644 (Mo.App. 1975) ("Achievement House" for boys living as family-type group could be allowed in zone for single-family dwellings without rezoning or special permit); YWCA v. Board of Adjustment, 134 N.J.Super. 384, 341 A.2d 356 (1975) (those who live together as a family, though not related by blood or marriage, cannot be discriminated against by community); Saunders v. Clark County Zoning Dep't, 66 Ohio St.2d 259, 421 N.E.2d 152 (1981) (group home for delinquent boys constituted a "family" for zoning purposes and was permissible in residential district); Jackson v. Williams, 714 P.2d 1017 (Okl.1985) (use of residence as a group home for five mentally retarded women and their housekeeper constituted a "single-family dwelling" within a zoning ordinance); Citizens for a Safe Neighborhood v. City of Seattle, 67 Wash.App. 436, 836 P.2d 235 (1992) (housing examiner's decision that house for homeless, low-income women recovering from alcohol and/or chemical dependency was a single-family residence, not a "halfway house," upheld). But see Maryland Comm'n on Human Relations v. Greenbelt Homes, Inc., 300 Md. 75, 475 A.2d 1192 (1984) (Maryland statute prohibiting marital-status discrimination in housing did not preclude a housing cooperative from enforcing a contract restricting occupancy to a cooperative member's immediate family and thus precluding a member from living

municipalities to provide an appropriate variety of housing.[69] The finding of such a duty has been generally approved by the writers, who often urge municipalities to take a more

there with her boyfriend); Open Door Alcoholism Program, Inc. v. Board of Adjustment of New Brunswick, 200 N.J.Super. 191, 491 A.2d 17 (1985) (halfway house for recovering alcoholics did not create functional equivalent of family unit for purposes of single-family zoning). Cf. Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (open-space zoning restricting use of land to single-family residences and open space upheld). See generally Dowd and Moore, *Moore v. City of East Cleveland* and Children's Constitutional Arguments, 85 Fordham L. Rev. 2603 (2017); Note, "Burning the House to Roast the Pig:" Unrelated Individuals and Single-Family Zoning's Blood Relation Criterion, 58 Corn.L.Rev. 138 (1972); Note, Excluding The Commune from Suburbia: The Use of Zoning for Social Control, 23 Hast.L.J. 1459 (1972). See also Annot., What Constitutes a "Family" Within Meaning of Zoning Regulation or Restrictive Covenant, 71 A.L.R.3d 693 (1976). It has been held that the terms "family" and "dwelling unit" in a zoning ordinance are not unconstitutionally vague. Douglass v. City of Spokane, 25 Wn.App. 823, 609 P.2d 979 (1980), review denied 94 Wash.2d 1006 (1980), involving an ordinance that defined "family" as "an individual or two or more persons related by blood, marriage or legal adoption, or a group of not more than five persons unrelated . . . , living together as a single housekeeping unit and doing their own cooking on the premises in a dwelling unit." See also, on the meaning of "family," Norwalk CORE v. David Katz & Sons, Inc., 410 F.2d 532 (2d Cir.1969), determining that a mother and father, their son, the son's wife and baby, were a "family" within statutory provisions requiring rents for relocation housing to be within the means of the family displaced. On the history of family-based zoning restrictions, see Note, ". . . Not Related by Blood, Marriage, or Adoption": A History of the Definition of "Family" in Zoning Law, 16 J. Affordable Housing & Commun. Dev. L. 144 (2007); Comment, The Definition of "Family" in Missouri Local Zoning Ordinances: An Analysis of the Justifications for Restrictive Definitions, 52 St. Louis U.L.J. 631 (2008). See also City of Baton Rouge/Parish of East Baton Rouge v. Meyers, 145 So. 3d 320 (La. 2014) (definition of "family" in development code upheld against vagueness, denial of equal protection, and lack of legitimate government purpose attacks), discussed in Note, All in the Family: Assessing the Definition of "Family" in *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 61 Loy. L. Rev. 407 (2015).

Alabama once construed its zoning statutes so as to allow municipalities to prohibit group homes for the mentally disabled in certain residential areas. Indian Rivers Community Health Center v. City of Tuscaloosa, 443 So.2d 894 (Ala.1983). This was reversed by a statute expressly abolishing any zoning law that prevents or prohibits the mentally ill from living in multi-family-zoned residential areas. Regulation as to Housing of Mentally Retarded or Mentally Ill Persons in Multi-Family Zone, Ala. Code §§ 11.52–75.1 (1986). See generally Steinman, The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study, 19 Urban Law. 1 (1987); Note, Zoning the Mentally Retarded Into Single-Family Residential Areas: A Grape of Wrath or a Fermentation of Wisdom, 1979 Ariz. St. L.J. 385; Case Comment, Community Commitment: To Accept or Reject the Mentally Ill?, 5 Whittier L. Rev. 417 (1983). On group residences for the elderly, see generally Pollack, Zoning Matters in a Kinder, Gentler Nation: Balancing Needs, Rights and Political Realities for Shared Residences for the Elderly, 10 St. Louis U. Pub. L. Rev. 501 (1991).

In City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995), it was held that a single-family zoning ordinance, defining a "family" as persons related by genetics, adoption, or marriage, or group of 5 or fewer unrelated persons, was not automatically exempt from the federal Fair Housing Act's prohibition of housing discrimination against the handicapped. To justify the single-family restriction, local officials must show that their particular application of their laws reasonably accommodates the needs of the handicapped. See Barrett, High Court Ruling Favors Group Homes, Wall St., J., May 16, 1995, at B12, concluding that the Court's ruling makes it harder for local governments to exclude many kinds of group homes from single-family neighborhoods. See generally Davis & Gaus, Protecting Group Homes for the Non-Handicapped: Zoning in the Post-*Edmonds* Era, 46 U. Kan. L. Rev. 777 (1998); Note, Civil Rights—Closing a Loophole in the Fair Housing Act—*City of Edmonds v. Oxford House, Inc.*, 70 Temple L. Rev. 369 (1997).

[69] Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977) (local governments must provide their fair-share of regional housing needs, including housing for low- and moderate-income groups); Urban League v. Mayor and Council of Carteret, 142 N.J.Super. 11, 359 A.2d 526 (1976), rev'd 170 N.J.Super. 461, 406 A.2d 1322 (eleven municipalities ordered by lower court to rezone so that each provided a fair share of its own and the county's low-and moderate-income housing needs, but appellate court held no relevant region shown); Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), cert. denied 423 U.S. 808, 96 S.Ct. 18, 46 L.Ed.2d 28 (1975) (the leading, and a famous, case; ordinance zoning most of township for single-family detached dwellings on 20,000 square-foot lots held invalid as contrary to general welfare and outside statutory powers), noted 61 A.B.A.J. 975 (1975), 59 Marq.L.Rev. 211 (1976), 7 U.Ind.L.Rev. 341 (1975); Surrick v. Zoning Hearing Board, 476 Pa. 182, 382 A.2d 105 (1977) (exclusion of multiple-family residences from most of township was unconstitutional; township must accept its fair share of all categories of persons desiring to live in area); Board of Supervisors of Willistown Township v. Walsh, 20 Pa.Cmwlth. 275, 341 A.2d 572 (1975); Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975) (apartment construction allowed on only 80 acres out of total of over 11,000; township is not putting a fair share of its land area to proper housing purposes). See Berenson v. Town

"regional" approach to their zoning decisions; and a trend may be seen toward requiring each locality to provide its "fair share" of low-and moderate-income housing.[70] The state of New Jersey has held that a municipality which zones for industrial uses must also zone so as to allow a "fair share" of lower income housing and that this obligation must be satisfied on an objective basis—a bona fide attempt is not sufficient.[71]

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of New Castle, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975) (local desire to maintain status quo must be balanced against greater public interest that *regional* needs be met); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (failure to provide for apartments was unconstitutional, though apartments not explicitly prohibited). But cf. Nigito v. Borough of Closter, 142 N.J.Super. 1, 359 A.2d 521 (1976), holding that even after the *Mt. Laurel* case, *supra*, an ordinance in New Jersey that does not provide for multi-family housing is not necessarily invalid; such an ordinance was thus upheld in a small, almost fully-developed borough. See also Rose, *Oakwood at Madison*: A Tactical Retreat to Preserve the *Mt. Laurel* Principle, 13 Urban L.Ann. 38 (1979), emphasizing that the New Jersey court, in the *Oakwood at Madison* case *supra*, stated that courts, in determining whether communities have provided for their "fair share" of low- and moderate-income housing, need not adopt fair share housing *quotas* or make findings in reference thereto. On the future of the "*Mt. Laurel* obligations," see Dantzler, Exclusionary Zoning: State and Local Reactions to the *Mount Laurel* Doctrine, 48 Urban Law. 653 (2016) (noting, at 659, that *Mount Laurel* emphasized that the zoning power "must be used to further the *general* welfare as opposed to the welfare of one particular, local segment of society"); Kinsey, The Growth Share Approach to *Mount Laurel* Housing Obligations: Origins, Hijacking, and Failure, 63 Rutgers L. Rev. 867 (2011); Mallach, The *Mount Laurel* Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment, 63 Rutgers L. Rev. 849 (2011); Note, A Forty-Year Failure: Why the New Jersey Supreme Court Should Take Control of *Mount Laurel* Enforcement, 41 Seton Hall Legis. J. 149 (2016). See generally Holmes, The Clash of Home Rule and Affordable Housing: The Mount Laurel Story Continues, 12 Conn. Pub. Interest L. J. 325 (2013). See also note 71 *infra*.

On laws that attempt to impose on builders and developers, in return for their being granted the necessary permits, an obligation to construct a certain amount of low-and/or moderate-income housing, see Chapter 21 *infra*.

In Fernley v. Board of Supervisors of Schuylkill Township, 509 Pa. 413, 502 A.2d 585 (1985), the court held that an ordinance totally prohibiting multifamily dwellings was unconstitutional. Since a total prohibition of an ordinarily legitimate use was shown, the burden shifted to the municipality to establish a police-power purpose, and a more substantial relationship to such a purpose had to be shown than where the regulation merely confined a use to a particular area. No such purpose was here shown. A "fair-share" analysis had been misapplied by the lower court, it was ruled, where that court had used the analysis to reach the conclusion that that no one had been excluded because the municipality was not a logical area for development; the "fair-share" formula might be used where there was partial, or de facto, exclusion of a use, but not where there was by law a total exclusion. On what are legitimate public purposes that might overcome the Pennsylvania presumption that a total prohibition of an ordinarily lawful use is unconstitutional, see Appeal of Marple Gardens, Inc., 99 Pa.Cmwlth. 485, 514 A.2d 216 (1986), appeal denied 514 Pa. 650, 524 A.2d 496 (1987).

[70] See Rose, Fair Share Housing Allocation Plans: Which Formula Will Pacify the Contentious Suburbs?, 12 Urban L.Ann. 3 (1976); Williams & Doughty, Studies in Legal Realism: *Mount Laurel, Belle Terre*, and *Berman*, 29 Rutgers L.Rev. 73 (1975); Note, Land Use Planning—Zoning Regulations That Exclude Segments of the Region's Population on the Basis of Wealth Are Presumptively Invalid, 7 Texas Tech. L.Rev. 182 (1975); Note, The Mount Laurel Case: A Question of Remedies, 37 U.Pitt.L.Rev. 442 (1975); Comment, Calling a Halt to Exclusionary Zoning in New Jersey, 15 Washburn L.J. 180 (1975). See generally Note, The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning, 74 Mich.L.Rev. 760 (1976) (most satisfactory answer to problems concerning low-cost housing lies in comprehensive legislation).

Following its general rule that total prohibitions of ordinarily lawful uses are presumed invalid (see note 69 *supra*), Pennsylvania has held unconstitutional a zoning ordinance totally excluding apartments from a community. Appeal of Girsh, *supra* note 69. Cf. Township of Willistown v. Chesterdale Farms, Inc., *supra* note 69 (fair share of township must be usable for apartment construction). See generally Comment, Do *Girsh* and *Mt. Laurel* Compel the Zoning of a Fair Share of Acreage for Apartment Use? Pennsylvania Says Yes, 13 Urban L.Ann. 277 (1977).

[71] Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983), on remand 207 N.J.Super. 169, 504 A.2d 66 (1984). This case (which is often called "*Mount Laurel II*", distinguishing it from the earlier litigation, "*Mount Laurel I*", cited in note 69 *supra*) also held that apparently exclusionary devices, such as low density limits on population, serve as evidence of facial invalidity of the zoning laws in which they are contained, but that this presumption of invalidity can be rebutted by the locality's showing of compliance, elsewhere in the community, with the obligation to provide a "fair share" of opportunity for low- and moderate-income housing. Thus, in New Jersey, "exclusionary" zoning does not enjoy the presumption of validity that has traditionally attached to this type, as well as other types, of zoning law; the presumption as to "exclusionary" zoning is now one of *invalidity*. On *Mt. Laurel II*, see generally

A related question is the *standing* of various persons and organizations, particularly non-residents of a community that has "exclusionary" zoning laws, to challenge zoning rules. Obviously, the exclusionary practices of one community may have an effect on the entire area. But the U.S. Supreme Court, in a case in which plaintiffs—non-residents of the excluding community, though all residents of the metropolitan area involved—alleged violation of their rights under the U.S. constitution and federal civil rights laws, announced a rather strict standard for standing: plaintiff must allege specific, concrete facts showing that the challenged practice harms him and that he would benefit, personally and in a tangible way, from the courts' intervention.[72] State statutes, however, usually provide merely that a party challenging a zoning law must be an "aggrieved person" (or similar language), and there is a tendency in many courts now to hold that municipal boundaries do not pose an absolute obstacle to a person's being "aggrieved" by the zoning practices of a neighboring community.[73]

Buchsbaum, No Wrong Without a Remedy: The New Jersey Supreme Court's Effort to Bar Exclusionary Zoning, 17 Urban Law. 59 (1985); Freilich, Donovan & Ralls, Anti-Trust Liability and Preemption of Authority: Trends and Developments in Urban, State and Local Government Law, 15 Urban Law. 705, 747–50 (1983); Rose, *The Mount Laurel II* Decision: Is It Based on Wishful Thinking?, 12 Real Estate L.J. 115 (1983). See also Rose & Rothman, After *Mount Laurel*: The New Suburban Zoning (1977) (written between the two *Mount Laurel* decisions). On the trend, as represented by *Mt. Laurel II*, toward undermining the favored position once enjoyed by "single-family zoning," see Burch & Ryals, Land Use Controls: Requiem for Zoning and Other Musings on the Year 1982, 15 Urban Law. 879 (1983).

In response to the *Mt. Laurel* holdings, the New Jersey legislature enacted a Fair Housing Act, which established a Council on Affordable Housing with the responsibility of designating housing regions, estimating needs, and adopting criteria and guidelines for determining a municipality's fair share of those needs. The legislation was held facially constitutional in Morris County Fair Housing Council v. Boonton Township, 209 N.J.Super. 393, 507 A.2d 768 (1985), and was subsequently upheld against a wide range of constitutional attacks in Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 510 A.2d 621 (1986) (sometimes called "*Mt. Laurel III*"), which praised the legislative approach as providing more consistency than a judicial approach. See generally Haar, Suburbs Under Siege: Race, Space, and Audacious Judges (Princeton Press 1996) (reviewed 30 U. Richmond L. Rev. 1093 (1996)) and Kirp, Dwyer & Rosenthal, Our Town: Race, Housing, and the Soul of Suburbia (Rutgers Press 1995), both reviewed 85 Geo. L. J. 2265 (1997); Colloquium, *Mount Laurel* and the Fair Housing Act: Success or Failure?, 19 Fordham Urban L.J. 59 (1991). See also Berger, Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases, 70 Neb. L. Rev. 186 (1991); Connerly & Smith, Developing a Fair Share Housing Policy for Florida, 12 J. Land Use & Envtl. L. 63 (1996); Comment, From Mt. Laurel to Montgomery: The Creation of Affordable Housing in Alabama, 23 Cumberland L. Rev. 197 (1993) (examining the possible creation of "*Mt. Laurel* obligations" in Alabama). On judicial attempts to develop "urban policy" in this area, see Rose, Waning Judicial Legitimacy: The Price of Judicial Promulgation of Urban Policy, 20 Urban Law. 801, 814–35 (1988). On the effects of *state* growth-control policies on exclusionary zoning, see generally Note, State-Sponsored Growth Management as a Remedy for Exclusionary Zoning, 108 Harv. L. Rev. 1127 (1995).

[72] Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). See Blum, The New Criteria for Standing in Exclusionary Zoning Litigation, 11 Suffolk U.L.Rev. 1 (1976); Note, Standing to Challenge Exclusionary Land-Use Devices in Federal Courts After Warth v. Sedlin, 29 Stan.L.Rev. 323 (1977). Cf. Coalition for Agriculture's Future v. Canyon County, 369 P. 3d 920 (Idaho 2016) (party's standing to challenge a land-use decision depends on whether the party's real property will be adversely affected by the decision). See generally Comment, Exclusionary Zoning and a Reluctant Supreme Court, 13 Wake Forest L.Rev. 107, 121 (1977). See also Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv.L.Rev. 645 (1973); Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599 (1962).

[73] See Stokes v. City of Mishawaka, 441 N.E.2d 24 (Ind.App.1982) (property owners who resided outside city limits on property adjacent to a rezoned tract within city limits had standing to seek declaratory relief as to the rezoning); Jefferson Landfill Comm. v. Marion County, 297 Or. 280, 686 P.2d 310 (1984); Annot., Standing of Owner of Property Adjacent to Zoned Property, but Not Within Territory of Zoning Authority, to Attack Zoning, 69 A.L.R.3d 805 (1976) (such persons often held to have standing); Annot., Standing of Municipal Corporation or Other Governmental Body to Attack Zoning of Land Lying Outside Its Borders, 49 A.L.R.3d 1126 (1973). But cf. Evans v. Lynn, 376 F.Supp. 327 (S.D.N.Y.1974), affirmed 537 F.2d 571 (2d Cir.—final decision on rehearing), cert. denied sub nom. Evans v. Hills, 429 U.S. 1066, 97 S.Ct. 797, 50 L.Ed.2d 784 (1977) (non-residents had no standing to challenge federal grants to a community by showing that its zoning discriminates against racial minorities where the non-residents did not complain that they had unsuccessfully

Broader than the question of zoning a locality entirely for single-family residences is the question of zoning the entire municipality for any single use. For instance, what about zoning the community exclusively for residences—though not necessarily single-family residences? There are a number of cases upholding such zoning, often with the argument that a community is entitled to preserve its essentially residential character so long as needs for business and other uses are adequately supplied elsewhere in the region.[74] But this again puts an obvious burden on the rest of an area—though a less extreme burden than where a community is zoned only for *single-family* dwellings. Here too, there are occasional cases finding such exclusive zoning unreasonable under the circumstances or beyond the statutory powers of the municipality.[75]

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sought housing in area or that the community had arbitrarily rejected housing proposals of benefit to them), discussed (prior to the final decision) in "Another Crack in the Suburban Zoning Wall," Bus. Week, July 21, 1975, at 41; Earth Movers of Fairbanks, Inc. v. Fairbanks North Star Borough, 865 P.2d 741 (Alaska 1993) (business competitor whose only alleged injury results from competition lacks standing to challenge land use decision; standing in this area is limited by statute). Compare Tayback v. Teton County Bd. of County Comm'rs, 2017 WY. 114, 402 P. 3d 984 (2017) (neighbors had standing to protest land-use decision despite their property not being directly adjacent to site). See generally Ayer, The Primitive Law of Standing in Land Use Disputes: Some Notes from a Dark Continent, 55 Iowa L.Rev. 344 (1969); Comment, Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement, 64 Mich. L.Rev. 1070 (1966); Note, Nonresidents Permitted to Protest Proposed Zoning Change, 38 N.Y.U. L. Rev. 161 (1963), noting Koppel v. City of Fairway, 189 Kan. 710, 371 P.2d 113 (1962); Note, Extending Standing to Non-Residents—A Response to the Exclusionary Effects of the Zoning Fragmentation, 24 Vand.L.Rev. 341 (1971); Note, Zoning: Looking Beyond Municipal Boundaries, 1965 Wash.U.L.Q. 107 (1965); Note, The "Aggrieved Person" Requirement in Zoning, 8 Wm. & M. L. Rev. 294 (1967). As to regional approaches to zoning and the persons who are allowed to challenge such zoning, see also Note, Crossing the Home-Rule Boundaries Should Be Mandatory: Advocating for a Watershed Approach to Zoning and Land Use in Ohio, 58 Clev. St. L. Rev. 463 (2010).

It has been held that residents of a community cannot be denied standing to protest that community's exclusionary zoning practices merely because those residents own no real property. Suffolk Housing Services v. Town of Brookhaven, 91 Misc.2d 80, 397 N.Y.S.2d 302 (Sup.Ct.1977), aff'd and mod. 63 A.D.2d 731, 405 N.Y.S.2d 302 (low-income persons protesting ordinance that excluded multi-family developments; they had standing, as did civil-rights organizations). On property-owning limitations on the right to vote, see generally the materials on bond elections in Chapter 15 *supra*, especially Section 15.7.

On the standing of *groups* of property owners to challenge zoning laws, see Annot., Standing of Civic or Property Owners' Association to Challenge Zoning Board Decision (as Aggrieved Party), 8 A.L.R. 4th 1087 (1981) (such associations are now usually recognized as having standing even though the association itself owns no property). See generally Douglaston Civic Ass'n, Inc. v. Galvin, 36 N.Y.2d 1, 364 N.Y.S.2d 830, 324 N.E.2d 317 (1974), listing the factors to be weighed in determining a homeowners' association's standing.

As to standing to protest *violations* of a zoning ordinance, see Rose v. Chaikin, 187 N.J.Super. 210, 453 A.2d 1378 (Ch.Div. 1982) (test for standing is not a stringent one; plaintiff must merely show that he or she is an "interested party" due to being denied reciprocal benefits of a common zoning plan; neighbors granted injunction against operation of windmill). Cf. HD Dunn & Son LP v. Teton County, 140 Idaho 808, 102 P.3d 1127 (2004) (neighbor who owned land adjacent to landowners had standing to challenge landowners' act of subdividing their land without complying with county ordinances).

[74] Valley View Village v. Proffett, 221 F.2d 412 (6th Cir.1955) (not necessarily unreasonable for small community to be zoned entirely residential); Cadoux v. Planning and Zoning Commission, 162 Conn. 425, 294 A.2d 582 (1972), cert. denied 408 U.S. 924, 92 S.Ct. 2496, 33 L.Ed.2d 335 (1972); City of Richlawn v. McMakin, 313 Ky. 265, 230 S.W.2d 902 (1950), cert. dism'd 340 U.S. 945, 71 S.Ct. 531, 95 L.Ed. 682. See generally Annot., Validity of Ordinance Zoning Entire Municipality for Residential Use, 54 A.L.R.3d 1282 (1974). See also Annot. Exclusion from Municipality of Industrial Activities Inconsistent With Residential Character, 9 A.L.R.2d 683 (1950).

[75] See Gundersen v. Bingham Farms, 372 Mich. 352, 126 N.W.2d 715 (1964) (beyond power given by enabling statute); Moline Acres v. Heidbreder, 367 S.W.2d 568 (Mo.1963) (single-use zoning beyond municipal power in Missouri); Dowsey v. Village of Kensington, *supra* note 66 (unreasonable to zone almost all of village exclusively for *one-family* dwellings); Town of Hobart v. Collier, 3 Wis.2d 182, 87 N.W.2d 868 (1958) (some lands in town not fit for any purpose allowed under the ordinance). Cf. Hamilton Co. v. Louisville & Jefferson County Planning & Zoning Commission, 287 S.W.2d 434 (Ky.1955) (where neighboring land had commercial structures and applicants' land was not suitable for residential purposes, rejecting reclassification of land from single-family residential to commercial found unwarranted).

What of zoning that singles-out for exclusion mobile homes and/or trailer parks? Historically, these were even less popular in many communities than were multi-unit dwellings, and total exclusions of such homes from a community have been upheld.[76] But the tendency is to be more favorable toward such uses,[77] though clearly mobile homes can still be excluded from most residential zones.[78]

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[76] Vickers v. Township Committee, 37 N.J. 232, 181 A.2d 129 (1962), cert. denied and appeal dism'd 371 U.S. 233, 83 S.Ct. 326, 9 L.Ed.2d 495; Stoddard v. Town of Marilla, 60 A.D.2d 771, 400 N.Y.S.2d 637 (1977); Davis v. McPherson, 58 O.O. 253, 132 N.E.2d 626 (1955), appeal dism'd 164 Ohio St. 375, 58 O.O. 157, 130 N.E.2d 794 (1955). See Hohl v. Township of Readington, 37 N.J. 271, 181 A.2d 150 (1962); State ex rel. Cunagin Construction Corp. v. Creech, 23 Ohio App.2d 13, 52 O.O.2d 8, 260 N.E.2d 617 (1969). See generally Annot., Validity and Application of Zoning Regulations Relating to Mobile Home or Trailer Parks, 42 A.L.R.3d 598 (1972). See also Annot., Use of Trailer or Similar Structure for Residence Purposes as Within Limitation of Restrictive Covenant, Zoning Provision, or Building Regulation, 96 A.L.R.2d 232 (1964); Annot., Classification, as Real Estate or Personal Property, of Mobile Homes or Trailers for Purposes of State or Local Taxation, 7 A.L.R. 4th 1016 (1981).

[77] Thus, several cases have now struck down total, or near-total, exclusions of mobile homes from communities. Smith v. Building Inspector, 346 Mich. 57, 77 N.W.2d 332 (1956); Gust v. Canton Township, 342 Mich. 436, 70 N.W.2d 772 (1955); Jackson & Perkins Co. v. Martin, 12 N.Y.2d 1082, 240 N.Y.S.2d 29, 190 N.E.2d 422 (1963); Hunter v. Richter, 9 Pa.D. & C.2d 58 (C.P.1957) (but upholding portion of ordinance requiring trailers staying in town beyond a certain length of time to meet standards for "dwellings"). See Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983), on remand 207 N.J.Super. 169, 504 A.2d 66 (1984) (the "Mt. Laurel II" case discussed in note 71 *supra*) (changed circumstances regarding the structural soundness, safety, and attractiveness of mobile homes have rendered absolute bans on such homes no longer justifiable on the ground of adverse effect on real estate values); Koston v. Town of Newburgh, 45 Misc.2d 382, 256 N.Y.S.2d 837 (1965) (statute did not give town the power to prohibit trailer camps); Robinson Township v. Knoll, 410 Mich. 293, 302 N.W.2d 146 (1981) (exclusion of mobile homes from all areas not designated as mobile-home parks was unreasonable and thus unconstitutional; overruling prior authority); Roddick v. Lower Macungie Zoning Board, 39 Pa. D. & C.2d 529 (C.P.1966) (trailer camps could be regulated by township but not totally prohibited). As to the improved appearance of many mobile homes, see Vick, The Home of the Future, Time magazine, April 3, 2017, at 46, on senior trailer parks. See generally Bartke & Gage, Mobile Homes: Taxation and Zoning, 55 Cornell L.J. 491 (1970).

Sometimes, exclusion of mobile homes has been achieved somewhat indirectly by ordinances declaring that such homes must—if they remain in the community a certain length of time, or if they have a permanent foundation, etc.—meet building code requirements for structures—which are often difficult for mobile homes to meet. See Morin v. Zoning Board of Review, 102 R.I. 457, 232 A.2d 393 (1967) (trailer with permanent foundation held to be structure). Cf. Lower Merion Township v. Gallup, 158 Pa.Super. 572, 46 A.2d 35 (1946) (citing cases), appeal dism'd 329 U.S. 669, 67 S.Ct. 92, 91 L.Ed. 591 (if house trailer was used for living or sleeping purposes within township for aggregate of more than 30 days, it became subject to building code rules on light, air, sanitation, and safety), noted 45 Mich.L.Rev. 225 (1946).

[78] See Jensen's, Inc. v. Town of Plainville, 146 Conn. 311, 150 A.2d 297 (1959); Cook v. Bandeen, 356 Mich. 328, 96 N.W.2d 743 (1959); State ex rel. Howard v. Village of Roseville, 244 Minn. 343, 70 N.W.2d 404 (1955); Stevens v. Stillman, 18 Misc.2d 274, 186 N.Y.S.2d 327 (1959); City of Raleigh v. Morand, 247 N.C. 363, 100 S.E.2d 870 (1957), appeal dism'd 357 U.S. 343, 78 S.Ct. 1369, 2 L.Ed.2d 1367. See Adams v. Cowart, 224 Ga. 210, 160 S.E.2d 805 (1968) (ordinance prohibited mobile homes in single-family residence; upheld); Stevens v. Smolka, 11 App.Div.2d 896, 202 N.Y.S.2d 783 (1960) (ordinance prohibited any new trailer camp in any residential or agricultural district; upheld). Cf. Hohl v. Township of Readington, *supra* note 76 (trailers could be excluded even from business zone). But see City of Eau Gallie v. Holland, 98 So.2d 786 (Fla.1957) (ordinance unconstitutional because it delegated legislative authority without adequate standards); Clark v. Joslin, 348 Mich. 173, 82 N.W.2d 433 (1957). On what constitutes a "trailer house" within the meaning of zoning regulations, see Clackamas County v. Dunham, 282 Or. 419, 579 P.2d 223 (1978). Sometimes, ordinances prohibit the outdoor storage of trailers, motor homes, etc.; and the validity of such regulations has usually been upheld. See Annot., Validity of Zoning Ordinances Prohibiting or Regulating Outside Storage of House Trailers, Motor Homes, Campers, Vans, and the Like, in Residential Neighborhoods, 95 A.L.R.3d 378 (1979). Laws restricting mobile homes to established parks have also usually been upheld. See Annot., Validity of Zoning or Building Regulations Restricting Mobile Homes or Trailers to Established Mobile Home or Trailer Parks, 17 A.L.R. 4th 106 (1982).

As to restrictions on prefabricated dwellings, see Your Home, Inc. v. City of Portland, 483 A.2d 735 (Me.1984), appeal after remand 499 A.2d 145 (Me.1985), where it was held that a city cannot deny a permit for construction of prefabricated homes merely because of the mobility of such structures if the applicants demonstrate compliance with building ordinances. The denial of applicant's permit was, however, ultimately upheld, the court finding valid an ordinance prohibiting erection of single-unit manufactured housing in a

Undoubtedly, one reason that there used to be considerable opposition to mobile homes in many neighborhoods was that they were considered unsightly. As their appearance has greatly improved so has the willingness to admit them to more and more zones. But this raises the general question of the validity of zoning for aesthetic purposes. Traditionally, aesthetic grounds were considered not sufficient in themselves to uphold the constitutionality of zoning—and this may still be the majority view.[79] But it was said by a case in the 1920s that when an aesthetic purpose was served by a zoning restriction, only a little more—something in the nature of a more practical reason—was needed to support the restriction.[80] Today the *trend* is toward holding that aesthetic reasons may even be enough in themselves to support the validity of otherwise-reasonable zoning,[81] and thus aesthetics may now be listed as the fourth purpose of

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residential zone outside of manufactured housing developments. Your Home, Inc. v. City of Portland, 501 A.2d 1300 (Me.1985). But cf. Tyrone Township v. Crouch, 426 Mich. 642, 397 N.W.2d 166 (1986) (township ordinance establishing minimum standards for prefabricated mobile homes in residential zones unfairly discriminated against mobile homes and was thus invalid); Geiger v. Zoning Hearing Bd. of North Whitehall, 510 Pa. 231, 507 A.2d 361 (1986) (ordinance that excluded mobile homes manufactured in one piece while permitting dwellings manufactured in two or more sections, or constructed on the site, held to make an arbitrary and capricious distinction and thus to violate Equal Protection). See generally Mandelker, Zoning Barriers to Manufactured Housing, 48 Urban Law. 233 (2016).

Ordinances have been passed in some communities precluding or restricting condominiums in certain residential zones. See Annot., Zoning or Building Regulations as Applied to Condominiums, 71 A.L.R.3d 866 (1976). See generally Rohan, Condominium Housing: A Purchaser's Perspective, 17 Stan.L.Rev. 842 (1965); Rosenstein, Inadequacies of Current Condominium Legislation—A Critical Look at the Pennsylvania Unit Property Law, 47 Temple L.Q. 655 (1974); Note, Cooperative Apartment Housing, 61 Harv.L.Rev. 1407 (1948); Symposium on Practical Problems of Condominiums, 11 Practical Lawyer 35–64 (Jan., 1965); Symposium on the Law of Condominiums, 47 St. John's L.Rev. 677 (1974). On the Uniform Condominium Act, see Jackson & Colgan, The Uniform Condominium Act from a Local Government Perspective, 10 Urban Law. 429 (1978). As to condominiums and other non-traditional dwellings, see also Section 20.9, n.117, paragraphs 3, 4, and 5.

[79] Detroit Edison Co. v. Wixom, 382 Mich. 673, 172 N.W.2d 382 (1969); Wolverine Sign Works v. City of Bloomfield Hills, 279 Mich. 205, 271 N.W. 823 (1937); State ex rel. Magidson v. Henze, 342 S.W.2d 261 (Mo.App.1961); Baker v. Somerville, 138 Neb. 466, 293 N.W. 326 (1940); Youngstown v. Kahn Brothers Building Co., 112 Ohio St. 654, 148 N.E. 842 (1925); Norris v. Bradford, 204 Tenn. 319, 321 S.W.2d 543 (1958); Niday v. City of Bellaire, 251 S.W.2d 747 (Tex.Civ.App.1952). See Women's Kansas City St. Andrew Society v. Kansas City, 58 F.2d 593 (8th Cir.1932); Jackson v. Bridges, 243 Miss. 646, 139 So.2d 660 (1962); Dowsey v. Village of Kensington, *supra* note 66; City of Euclid v. Fitzthum, 48 Ohio App.2d 297, 357 N.E.2d 402 (1976) (saying Ohio treats zoning for purely aesthetic reasons as unconstitutional). See generally Annot., Aesthetic Objectives or Considerations as Affecting Validity of Zoning Ordinance, 21 A.L.R.3d 1222 (1968); 82 Am.Jur.2d Zoning §§ 41–42 (1976). See also Singh, Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics, 90 Ind. L. J. 1525 (2015).

[80] People v. Sterling, 128 Misc. 650, 220 N.Y.S. 315 (1927), aff'd 222 App.Div. 849, 226 N.Y.S. 881. See Trust Co. v. City of Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951) (it's no *objection* to zoning ordinance that it tends, in addition to other effects, to promote aesthetics). Cf. United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964) (aesthetics relevant when they bear on questions of land utilization). See also Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), upholding the use of eminent domain for urban renewal and noting that the legislature may determine that a community should be beautiful as well as healthy. For discussion of *Berman v. Parker* and its importance to the laws of zoning, eminent domain, public housing, and urban renewal, see Lavine, Urban Renewal and the Story of *Berman v. Parker*, 42 Urban Law. 423 (2010). As to the case's particular importance in urban renewal, see Section 20.2, *infra*.

[81] See State v. Diamond Motors, 50 Hawaii 33, 429 P.2d 825 (1967) (upholding zoning controls on location and size of billboards; noting power under Hawaiian constitution); Lamar Corp. v. City of Twin Falls, 133 Idaho 36, 981 P.2d 1146 (1999) (city may regulate the construction and placement of billboards for purpose of preserving aesthetics); Westfield Motor Sales Co. v. Town of Westfield, 129 N.J.Super. 528, 324 A.2d 113 (1974); Cromwell v. Ferrier, 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749 (1967) (holding limits on location of billboards); Oregon City v. Hartke, 240 Or. 35, 400 P.2d 255 (1965) (total exclusion of automobile wrecking yards from city upheld; a leading case); Racine County v. Plourde, 38 Wis.2d 403, 157 N.W.2d 591 (1968). Cf. Highway 100 Auto Wreckers, Inc. v. City of West Allis, 6 Wis.2d 637, 96 N.W.2d 85 (1959) reh. denied 6 Wis.2d 637, 97 N.W.2d 423 (upholding ordinances that prohibited burning of automobile bodies and parts). See generally Agnor, Beauty Begins a Comeback: Aesthetic Considerations in Zoning, 11 J. Pub. L. 230 (1962); Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 Law & Contemp. Prob. 218 (1955); Rodda,

zoning. This purpose has been especially important in cases involving bans on automobile-wrecking yards and junkyards,[82] and has been relied on in many cases dealing with restrictions on billboards and signs.[83] Many ordinances forbidding or

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Accomplishment of Aesthetic Purposes Under the Police Power, 27 S.Cal.L.Rev. 149 (1954); Sayre, Aesthetics and Property Values: Does Zoning Promote the Public Welfare?, 35 A.B.A.J. 471 (1949); Note, Zoning for Aesthetics—A Problem of Definition, 32 U.Cin.L.Rev. 367 (1963); Note, Aesthetic Control of Land Use: A House Built Upon the Sand?, 59 Nw.U.L.Rev. 372 (1964); Note, Aesthetic Considerations in Land Use Regulation, 2 Willamette L.J. 420 (1963); Note, The Aesthetic as a Factor Considered in Zoning, 15 Wyo.L.J. 77 (1960). Aesthetics may now be held sufficient justification for zoning that restricts development on some properties in order to preserve the scenic view enjoyed by owners of other properties. See Landmark Land Co. v. City & County of Denver, 728 P.2d 1281 (Colo.1986), appeal dism'd 483 U.S. 1001, 107 S.Ct. 3222, 97 L.Ed.2d 729 (1987) (ordinance extending mountain view protection to a greater area of land held reasonably related to legitimate public purpose of protection of aesthetics). But any ordinances promoting aesthetics are vulnerable to attack on vagueness and overbreadth grounds. See Note, Beauty and the Well-Drawn Ordinance: Avoiding Vagueness and Overbreadth Challenges to Municipal Aesthetic Regulations, 6 J.L. & Pol'y 853 (1998). As to the extent to which additional states are becoming more receptive to aesthetic regulations, compare Bufford, Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation, 48 U.M.K.C.L. Rev. 125 (1980) (the number of jurisdictions accepting aesthetics as a basis for land use regulation found to be increasing), with the later response of Pearlman, Linville, Phillips & Prosser, Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation, 38 Urban Law. 1119 (2006) (there has been an increase in the number of jurisdictions that allow aesthetics alone to justify a land use regulation, but the increase has not been dramatic).

In People v. Stover, 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272 (1963), appeal dism'd 375 U.S. 42, 84 S.Ct. 147, 11 L.Ed.2d 107, an ordinance banning clotheslines in front yards or side yards facing a street was upheld despite a protesting citizen's claim that the ordinance interfered with his free speech: he was demonstrating his objection to city property taxes by putting tattered rags on the clothesline in front of his house. But more serious freedom-of-speech issues are raised by many of the cases dealing with aesthetic restrictions on billboards and signs; see note 83 *infra*.

The law of nuisance—especially private nuisance—has also played a role in attempts to eliminate "eyesores." See McVicars v. Christensen, 320 P.3d 948 (Idaho 2014) (landowner does not have the right under nuisance law to prohibit the erection on adjoining land of structures he or she considers not aesthetically pleasing, though nuisance law does prohibit erection of a structure that serves no useful purpose and is only erected to injure a neighbor); Noel, Unaesthetic Sights as Nuisance, 25 Corn. L.Q. 1 (1939). See generally Prosser & Keeton, Law of Torts 626 n. 3 (5th ed. 1984).

[82] Oregon City v. Hartke, *supra* note 81, where a total ban on automobile wrecking yards was upheld solely on aesthetic grounds. See Texas Co. v. City of Tampa, 100 F.2d 347 (5th Cir.1938); Leary v. Adams, 226 Ala. 472, 147 So. 391 (1933); Radco v. Zoning Commission, 27 Conn.Sup. 362, 238 A.2d 799 (Com.Pl.1967) (with review of cases); Howden v. City of Savannah, 172 Ga. 833, 159 S.E. 401 (1931); Highland Oil Corp. v. Lathrup Village, 349 Mich. 650, 85 N.W.2d 185 (1957); Slater v. City of River Oaks, 330 S.W.2d 892 (Tex.Civ.App. 1959). Cf. City of Baltimore v. Muller, 242 Md. 269, 219 A.2d 91 (1966) (denial of permit to allow filling station in residential area held justified; station would be traffic hazard and unwarranted commercial intrusion); City of Jackson v. McPherson, 162 Miss. 164, 138 So. 604 (1932) (noting importance of preserving desirable home surroundings in predominantly residential areas). But cf. City of St. Louis v. Friedman, 358 Mo. 681, 216 S.W.2d 475 (1948), upholding an exclusion of junkyards but saying that aesthetics are definitely not enough reason for such a ban. A stronger case for exclusion of junkyards or automobile wrecking yards may be established if the zoning authority does not rely on aesthetics alone but relies largely or entirely on health concerns. See Schuster v. Plumstead Township Zoning Hearing Bd., 69 Pa.Cmwlth. 271, 450 A.2d 799 (1982) (township's water supply came from well, which could be polluted by plaintiff's proposed automobile wrecking and recycling center). See generally Comment, Municipal Regulation of Junk Yards, 12 Syracuse L.Rev. 79 (1960); Annot., Validity, Construction, and Application of Zoning Ordinance Relating to Operation of Junkyard or Scrap Metal Processing Plant, 50 A.L.R.3d 837 (1973). See also Annot., Automobile Wrecking Yard or Place of Business as Nuisance, 84 A.L.R.2d 653 (1962).

Sometimes, bans on junk yards and comparable uses have been found unreasonable where the law's effect was to exclude such uses from a municipality entirely. See Deshler v. Hoops, 26 Ohio O. 2d 30, 196 N.E.2d 476 (Com.Pl.1963). Cf. Shatz v. Phillips, 225 Tenn. 519, 471 S.W.2d 944 (1971) (ban of junkyards from business zones found unreasonable). See also Comment, Can a City Declare That All Pickup Trucks Are Legally Ugly? A Florida Case Tests the Limits of Aesthetic Regulation, 9 Fla. Intl. U.L. Rev. 83 (2013), commenting on Kuvin v. City of Coral Gables, 64 So. 3d 118 (Fla. 2011).

[83] See Valley View Village v. Proffett, 221 F.2d 412 (6th Cir.1955) (ban on signs in residential areas); Grant v. City of Baltimore, 212 Md. 301, 129 A.2d 363 (1957) (removal of billboards from residential areas within 5 years); United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964) (total ban on advertising signs in all districts); United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 93 A.2d 362

(1952) (same). But cf. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (city could not limit contents of billboards to commercial messages, or permit some noncommercial signs but not others); Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956) (immediate removal of nonconforming billboards could not be required). See generally Annot., Validity and Construction of Ordinance Prohibiting Roof Signs, 76 A.L.R.3d 1162 (1977); Annot., Power of Municipality as to Billboards and Outdoor Advertising, 72 A.L.R. 465 (1931), supplemented, 58 A.L.R.2d 1314 (1958). See also Annot., Billboards and Other Outdoor Advertising Signs as Civil Nuisance, 38 A.L.R.3d 647 (1971).

The *Metromedia* case *supra* was remanded to the California Supreme Court. Noting that the U.S. Supreme Court had found that the ordinance-in-question violated the First Amendment to the extent it prohibited noncommercial billboards, the California court ruled that the ordinance could not be fairly construed so as to preserve its constitutionality. Limiting the ordinance's scope to prohibiting only commercial signs would, the court held, be clearly contrary to the language of the law and the intent of its drafters, and would invite constitutional difficulties with respect to distinguishing between commercial and noncommercial signs. Metromedia, Inc. v. City of San Diego, 32 Cal.3d 180, 185 Cal.Rptr. 260, 649 P.2d 902 (1982).

Subsequently, the U.S. Supreme Court gave strong endorsement to the protection of aesthetics as a valid ground for restrictions on signs in Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), on remand 738 F.2d 353 (9th Cir.1984). The Court there upheld, as reasonably necessary to the goal of avoiding visual clutter, an ordinance banning the affixing of handbills or signs to utility poles and other designated objects in public places. The Court relied heavily on its decision in the *Metromedia* case, *supra*, where seven Justices had indicated that a content-neutral prohibition on outdoor signs would be upheld. Cf. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982) (ordinance restricting, for aesthetic reasons, the size, number, and location of signs upheld). But see City of Ladue v. Gilleo, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994), where the Court invalidated (as applied to an 8.5-by-11-inch sign displayed during the Persian Gulf War in the second-story window of a house and proclaiming "For Peace in the Gulf") an ordinance banning all residential signs (with limited exceptions) for the purpose of minimizing visual clutter. The ordinance was found broader than necessary to achieve its goal and thus violative of residents' right of free speech. See generally Kramer, Members of the City Council v. Taxpayers for Vincent, A Step Backward for Political Campaigning, 17 Urban Law. 91 (1985); McPherson, Municipal Regulation of Political Signs: Balancing First Amendment Rights Against Aesthetic Concerns, 45 Drake L. Rev. 767 (1997).

In general, since the *Members of City Council v. Taxpayers for Vincent* case, *supra*, sign ordinances have been upheld *if* found to advance governmental interest in aesthetics, to be narrowly tailored to achieve that governmental interest, and to leave open ample alternative communication channels. See Salib v. City of Mesa, 212 Ariz. 446, 133 P.3d 756 (App. 2006); City of Seattle v. Mighty Movers, Inc., 152 Wash.2d 343, 96 P.3d 979 (2004) (also holding that utility poles are a nonpublic forum and that regulations as to them need only be reasonable, not the most reasonable or the only reasonable limitation). As to what constitutes the "visual clutter" that the *Members of City Council v. Taxpayers for Vincent* case declared subject to reasonable government regulation, see Note, Scylla or Charybdis: Navigating the Jurisprudence of Visual Clutter, 103 Mich. L. Rev. 1877 (2005). Because of the difficulty of drafting ordinances that are reasonably designed to prevent visual clutter or otherwise advance governmental interests in aesthetics, as illustrated by the above-cited *Metromedia* litigation and the *City of Ladue* case, some commentators believe that sign regulations will increasingly be found unconstitutional. See Menthe, Writing on the Wall: The Impending Demise of Modern Sign Regulation Under the First Amendment and State Constitutions, 18 George Mason U. Civ. Rights L.J. 1 (2007). Cf. Reed v. Town of Gilbert, ___ U.S. ___, 135 S.Ct. 2218 (2015) (town's sign code that subjected signs to varying restrictions according to content was subject to strict scrutiny and thus not sustainable). See generally Connolly and Weinstein, Sign Regulation after *Reed*: Suggestions for Coping With Legal Uncertainty, 47 Urban Law. 569 (2015); Note, Lawn Sign Litigation: What Makes a Statute Content-Based for First Amendment Purposes?, 21 Suffolk J. Trial & App. Advocacy 320 (2016). As to the significance of *Reed*, compare Armijo, *Reed v. Town of Gilbert*; Relax, Every Body, 58 Boston Coll. L. Rev. 65 (2017), with Note, Free Speech and Signage After *Reed v. Town of Gilbert*: Signs of Change From the Bayou State, 44 Southern U. L. Rev. 181 (2017). Compare also Sullivan and Solomou, Public Regulation of Non-commercial Speech in the United States and United Kingdom: A Comparison, 49 Urban Law. 415 (2017), saying (at 430), "*Reed* now establishes a precedent that content-based discrimination among non-commercial messages is unconstitutional, a result that has profound effects with regard to all public regulation of expression." See also National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (California law requiring licensed pregnancy-related clinics to disseminate notice stating existence of publicly-funded family-planning services was a content-based regulation of speech and unduly broadened clinics' protected speech).

As to bans on portable signs, see Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir.1987), cert. denied 485 U.S. 981, 108 S.Ct. 1280, 99 L.Ed.2d 491 (1988) (ban on portable signs in beach community upheld largely on aesthetic grounds); Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir.1987), reh. denied 829 F.2d 1124 (5th Cir.1987), noted 17 Stetson L. Rev. 829 (1988) (ordinance banning portable signs furthered city's aesthetic interest and did not violate First Amendment). Cf. Mobile Sign, Inc. v. Town of Brookhaven, 670 F.Supp. 68 (E.D.N.Y. 1987), upholding against First Amendment attack an ordinance

restricting advertising signs contain an exception for signs advertising the business conducted on that very premise. These latter signs can be considered an accessory use of the property, and the distinction in their favor is normally upheld.[84]

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restricting the time a mobile sign could remain at a given location. See also Kitsap County v. Mattress Outlet/Kevin Gould, 153 Wash.2d 506, 104 P.3d 1280 (2005) (raincoat-clad workers used as offsite advertisements constituted "use of signs" within county's sign ordinances, but ordinances held unconstitutional as failing to serve county's asserted interest in aesthetics and safety and as being more extensive than necessary).

Some authority takes the view that total bans on signs or billboards are unconstitutional, though lesser restrictions may not be. See Bell v. Township of Stafford, 110 N.J. 384, 541 A.2d 692 (1988) (ordinance outlawing both commercial and noncommercial billboards found patently unconstitutional where no adequate alternative means of like communication was afforded). But cf. Outdoor Systems, Inc. v. City of Mesa, 169 Ariz. 301, 819 P.2d 44 (1991), where the court upheld on aesthetic grounds an ordinance prohibiting all off-premises advertising signs and conditioning issuance of new construction permits on removal of any nonconforming signs located on the parcel for which the permits were sought.

Bans on signs advertising tobacco products and/or liquor may be upheld even if more general bans would not be. See Penn Advertising v. Mayor of Baltimore, 63 F.3d 1318 (4th Cir.1995) (cigarette billboards); Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir.1995), cert. granted, judgment vacated 517 U.S. 1206, 116 S.Ct. 1821, 134 L.Ed.2d 927 (1996) (outdoor advertising of liquor), both discussed in Note, Over the *Edge*: The Fourth Circuit's Commercial Speech Analysis in *Penn Advertising* and *Anheuser-Busch*, 74 N.C.L. Rev. 2086 (1996). See generally Marshall, Regulation of Signs and Outdoor Advertising, 28 Urban Law. 701 (1996).

[84] Board of Adjustment v. Osage Oil & Transportation, Inc., 258 Ark. 91, 522 S.W.2d 836 (1975), appeal dism'd, cert. denied 423 U.S. 941, 96 S.Ct. 350, 46 L.Ed.2d 273 (signs advertising goods and services offered on the premises were merely restricted in size, while others were totally prohibited); Schloss v. Jamison, 262 N.C. 108, 136 S.E.2d 691 (1964) (with review of cases); Silver v. Zoning Board of Adjustment, 381 Pa. 41, 112 A.2d 84 (1955). See John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 369 Mass. 206, 339 N.E.2d 709 (1975) (local government could limit size and location of non-accessory (off-premises) advertising signs and require their removal within 5 years). Cf. Burk v. Municipal Court, 229 Cal.App.2d 696, 40 Cal.Rptr. 425 (Dist.Ct. 1964) (upholding ban on "for sale" or "for rent" signs by brokers in residential areas, but permitting property-owner to so advertise); Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944) (upholding validity of ordinance prohibiting off-premises advertising structures in certain zones; but noting that as to visibility, there is no essential difference between using the premises to advertise the owner's business and using it to advertise the business of another). See generally Jourdan, Hurd, Hawkins & Winson-Geideman, Evidence-Based Sign Regulation: Regulating Signage on the Basis of Empirical Wisdom, 45 Urban Law. 327 (2013), discussing local government regulation of on-premises signage; Annot., Validity and Construction of State or Local Regulation Prohibiting Off-Premises Advertising Structures, 81 A.L.R.2d 486 (1977). Annot., Advertising Rights on Leased Premises, 20 A.L.R.2d 940 (1951). See also Annot., Validity of Regulations Restricting Size of Freestanding Advertising Signs, 56 A.L.R.3d 1207 (1974). Some cases have invalidated bans on off-premises advertising signs where such bans applied throughout an entire municipality, township, etc., finding such a sweeping prohibition unreasonable. See Metromedia, Inc. v. City of Des Plaines, 26 Ill.App.3d 942, 326 N.E.2d 59 (1975) (ordinance prohibited all off-premises outdoor advertising within city limits—held facially unconstitutional; court says aesthetic considerations alone cannot justify exercise of police power); Daikeler v. Zoning Board of Adjustment, 1 Pa.Cmwlth. 445, 275 A.2d 696 (1971) (ban throughout township unreasonable); Norate Corp. v. Zoning Board, 417 Pa. 397, 207 A.2d 890 (1965) (saying courts are inclined to invalidate a ban on off-site advertising if it applies everywhere in city or township; review of cases). Cf. City of Naples v. Polk, 346 So.2d 1076 (Fla.App.1977) (ban on all "non-point-of-sale advertising" invalid). On the other hand, a ban on off-premises signs that applies throughout an historic district is likely to be upheld. See Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir.1992), cert. denied 508 U.S. 930, 113 S.Ct. 2395, 124 L.Ed.2d 296 (1993) (aesthetics considered a sufficiently compelling government interest, especially in an historic area; since ban did not apply to other areas of city, there were plenty of other places for signs). As to the application to *non*commercial advertising of bans on off-site signs, see Forsling, After *Southlake Property*: Settling the Confusion Over the Location of Billboards Containing Noncommercial Speech, 28 Stetson L. Rev. 721 (1999), discussing and advocating the traditional view that noncommercial signs are off-site unless placed on premises relating to the message conveyed.

Special problems of constitutional rights may be presented where a ban applies to political advertising. See Farrell v. Township of Teaneck, 126 N.J.Super. 460, 315 A.2d 424 (1974), holding unconstitutional a ban on such signs in residential areas; Peltz v. South Euclid, 11 Ohio St.2d 128, 228 N.E.2d 320 (1967), holding unconstitutional as violative of the First Amendment an ordinance banning all political signs. More lenient treatment of political signs is thus often upheld. See Montana Media, Inc. v. Flathead County, 314 Mont. 121, 63 P.3d 1129 (2003) (city ordinance's exemption of political signs from permit requirements upheld as not unconstitutionally vague). But see West Coast Media, LLC v. City of Gladstone, 192 Or.App. 102, 84 P.3d 213

What of zoning that attempts not only to exclude unsightly uses but that attempts to control the architecture of those structures that are erected? Such controls are obviously aimed to a large extent at creating aesthetically pleasing areas—but the controls also may contribute to the homogeneity of a zone, may improve property values in the zone and the community, etc. Thus, such restrictions relate to a number of the purposes for zoning, and may be considered to have given birth to a separate, and fifth, ground recognized as a valid purpose for zoning: control of architecture.[85] Often, such control is achieved by allowing some commission or board to grant or refuse building permits according to whether or not the proposed structure will be in conformity with existing buildings and features of the neighborhood. Such delegations will be upheld if definite and reasonable standards are established for the administering body to apply.[86]

Sixth, zoning is increasingly being used to preserve—in substance as well as appearance—historic districts, such as the French Quarter of New Orleans, the historic buildings of Nantucket, and the historical district of Santa Fe.[87] Creation of an "historic

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(2004) (city code provision violated state constitutional right to free expression by permitting campaign signs and public service information billboards in both on-premises and off-premises circumstances, while prohibiting off-premises commercial advertising). See generally 3d para., note 83, *supra*. See also Fox, Smut, Smokes and Spirits: The First Amendment Re-examined, 32 Urban Law. 449 (2000); Note, Regulation of Political Signs in Private Homeowner Associations: A New Approach, 59 Vand. L. Rev. 571 (2006).

[85] See State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo.1970) (noting stabilizing and protecting of property values, and finding that sufficient standards had been given the architectural board that had to decide whether a proposed structure would be permitted); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955), cert. denied 350 U.S. 841, 76 S.Ct. 81, 100 L.Ed. 750 (building permit would not be issued if building was so at variance with existing structures as to cause substantial depreciation in property values). See generally Annot., Validity and Construction of Zoning Ordinance Regulating Architectural Style or Design of Structure, 41 A.L.R.3d 1397 (1972). See also Note, Wish You Were Here: A Cross-cultural Analysis of Architectural Preservation, Reconstruction, and the Contemporary Built Environment, 30 Syracuse J. Int'l L. & Com. 395 (2003). On the various methods that a city may use to achieve uniformity and beauty in its buildings, see Tappendorf, Architectural Design Regulations: What Can a Municipality Do to Protect Against Unattractive, Inappropriate, and Just Plain Ugly Structures?, 34 Urban Law. 961 (2002).

[86] See State ex rel. Stoyanoff v. Berkeley, *supra* note 85; Reid v. Architectural Board of Review, 119 Ohio App. 67, 192 N.E.2d 74 (1963) (board had denied permit to single-story, ten-foot high, U-shaped house in area of stately, older, two-and-a-half story homes). On possible First Amendment problems with the use of zoning to control architecture, see Poole, Architectural Appearance Review Regulations and the First Amendment: The Good, the Bad, and the Consensus Ugly, 19 Urban Law. 287 (1987). Uniformity of architectural appearance in many neighborhoods has been achieved by restrictive covenants. See Annot., Validity and Construction of Restrictive Covenant Controlling Architectural Style of Buildings to Be Erected on Property, 47 A.L.R.3d 1232 (1973). See also Schindler, Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment, 124 Yale L. J. 1934 (2015).

[87] On New Orleans: Maher v. City of New Orleans, 371 F.Supp. 653 (E.D.La. 1974), aff'd 516 F.2d 1051 (5th Cir.) reh. denied 521 F.2d 815, cert. denied 426 U.S. 905, 96 S.Ct. 2225, 48 L.Ed.2d 830; City of New Orleans v. Levy, 223 La. 14, 64 So.2d 798 (1953); City of New Orleans v. Pergament, 198 La. 852, 5 So.2d 129 (1941); City of New Orleans v. Impastato, 198 La. 206, 3 So.2d 559 (1941). On Nantucket: Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955) (emphasizing importance of tourism to the community, and importance to the tourism of preserving the old buildings). (Cf. Opinion of the Justices to the Senate, 333 Mass. 783, 128 N.E.2d 563 (1955), upholding creation of an historic district for the Beacon Hill area of Boston; Attorney General v. Williams, 174 Mass. 476, 55 N.E. 77 (1899), upholding historic district around Copley Square in Boston; compensation was provided, but the court commented that the police power might have been used.) On Santa Fe: See City of Santa Fe v. Gamble-Skogmo, Inc., *supra* note 85. An historic district somewhat smaller in scale has been upheld as created around the home of Abraham Lincoln in Springfield, Illinois: M & N Enterprises v. City of Springfield, 111 Ill.App.2d 444, 250 N.E.2d 289 (1969); Rebman v. City of Springfield, 111 Ill.App.2d 430, 250 N.E.2d 282 (1969). See generally Preservation Law Symposium, Re-inventing the Past, 8 Widener L. Symposium J. i–vi, 163–483 (2002). For a critique of historic-district ordinances in a number of municipalities, see Tipson, Putting the History Back in Historic Preservation, 36 Urban Law. 289 (2004), concluding that "Historic district ordinances and guidelines suffer today from an untenable degree of theoretical incoherence." *Id.* at 316. See also Byrne, Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law, 22 Tulane Envtl. L. J. 203 (2009).

zone," and restriction on uses and changes permitted therein, is a fairly easy process if buildings of particular significance are conveniently grouped together, as in the above examples. But many structures of historic (or architectural) importance are scattered throughout various regions of our country. Thus, some local governments have established "landmark commissions" (or similarly named bodies) to identify and designate important landmarks; these structures may then not be demolished or substantially altered unless it is shown the structure cannot, in its existing state, earn a fair return.[88] There have sometimes been problems with declaring churches and other

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It has been observed that historic-preservation zoning started with Charleston, South Carolina, in 1924, and New Orleans, in 1925, with at least 39 municipalities now having districts zoned as "historic." Note, The Police Power, Eminent Domain, and the Preservation of Historic Property, 63 Colum.L.Rev. 708, 713–14 (1963). On Charleston's program, see Hosmer, The Charleston Ordinance, Preservation News, March, 1981, at 5. See generally Comment, Legal Methods of Historic Preservation, 19 Buffalo L.Rev. 611 (1970); Note, Land Use Controls in Historic Areas, 44 Notre Dame Law. 379 (1969). See also Thoresen, Historic Districts Aren't Obsolete, But . . . , Historic Preservation, July/Aug., 1981, at 46. On developments in New Orleans's preservation efforts, see "Builders Take on Old New Orleans," Bus. Week, Jan. 27, 1973, at 60. In City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976), the U.S. Supreme Court upheld, per curiam, a prohibition on street vendors in the New Orleans French Quarter, containing an exception ("grandfather clause") for those who had continually operated the same business in the same locality 8 years or more. See generally Robinson and Green, Historic Preservation: Law and Culture (Carolina Academic Press Casebook 2018). On New Orleans, see also Note, Rebuilding From Ruins: The Role of Historic Preservation in the Wake of Disaster, 25 U. Fla. J. L & Pub. Pol'y 115 (2014). On trade restrictions, see generally Chapter 23 *infra*.

Though the creation of an "historic district" means that restrictions will be imposed on changes that can be made, residents of an area are sometimes anxious to obtain the designation for their area, believing it will ensure property values and physical appearance. See Tatum, A City Cornerstone Discovers Salvation, Dallas Morning News, Nov. 14, 1976, § E, at 1. See generally Note, Historic Districts: Preserving the Old With the Compatible New, 59 Wm. & Mary L. Rev. 345 (2017). On a notable effort to allow low-income residents to remain in an historic district, while the historic character of the area is also preserved, see McMillan, Staying Home in Savannah, Historic Preservation magazine, March/April, 1980, at 10. See generally Note, By What We Have Destroyed: Historic Preservation and the Preservation of Individual Property Rights, 52 U. Louisville L. Rev. 153 (2013); Comment, Historic Districts and the Imagined Community: A Study of the Impact of the Old Georgetown Act, 24 Seton Hall J. Sports & Entertainment L. 81 (2014). As to problems of selecting historic districts and drawing their boundaries, see Gilman-Forlini, The Bromo Tower Arts and Entertainment District: Then and Now, 112 Maryland Hist. Mag. 116 (Spring/Summer 2017), on Baltimore's creation of districts designed to create financial benefits for artists. On the popularity of the preservationist movement and resulting rejuvenation of some downtown areas, see Collins, Waters and Dotson, America's Downtowns: Growth, Politics and Preservation (Preservation Press 1991); "Spiffing Up the Urban Heritage," Time, Nov. 23, 1987, at 72. As to historic preservation in rural areas, see Note, Confronting the Appalachian Breakdown: Historic Preservation Law in Appalachia and the Potential Benefits of Historic Preservation for Rural Communities, 110 W. Va. L. Rev. 1303 (2008).

Some municipalities have "Heritage Tree" ordinances, providing that trees over a certain size cannot be removed or altered without permission from a local commission. Such ordinances protect both the heritage and the beauty of a community. See "Sacramento's Shady Side," American Way magazine, Oct., 1980, at 31 (Sacramento protects trees that are 100 inches or more in girth and in good health). See generally Shea, A Shorter Cut to Forestation: The Constitutionality of Local Tree Ordinances, 20 State & Local L. News, No. 4, at 3 (Summer, 1997). See also Braverman, "Everybody Loves Trees": Policing American Cities Through Street Trees, 19 Duke Envtl. L. & Pol'y F. 81 (2008); Braverman, Governing Certain Things: The Regulation of Street Trees in Four North American Cities, 22 Tulane Envtl. L. J. 35 (2008); Buckley, America's Conservation Impulse: A Century of Saving Trees in the Old Line State (Maryland) (Center for American Places at Columbia College Chicago 2010), reviewed by Bergman, 107 Md. Hist. Mag. 390 (Fall 2012).

[88] See Note, Urban Landmarks: Preserving Our Cities' Aesthetic and Cultural Resources, 39 Alb. L.Rev. 521 (1974); Note, Landmark Preservation Laws: Compensation for Temporary Taking, 35 U.Chi. L.Rev. 362 (1968) (urging that the laws be found unconstitutional *unless* the owner is reimbursed for losses caused by the restrictions); "A National Surge of Preservationist Power," Bus. Week, April 21, 1980, at 157. See generally Byrne, Precipice Regulations and Perverse Incentives: Comparing Historic Preservation Designation and Endangered Species Listing, 27 Geo. Int'l Envtl. L. Rev. 343 (2015); Comment, From Independence Hall to the Strip Mall: Applying Cost-Benefit Analysis to Historic Preservation, 47 Envtl. L. 429 (2017); Comment, A New Devil in the White City: The Demolition of Prentice Women's Hospital and the Failures of Chicago's Landmarks Ordinance, 48 J. Marshall L. Rev. 391 (2014); Twentieth Century Task Force on Urban Preservation Policies (O. Lehman, Chair), Living Cities (Center for Urban Policy Research 1985) (with

religious structures to be historical landmarks, thus making them subject to special restrictions, in light of the "free exercise of religion" clause of the U.S. Constitution.[89] One attempt by Congress to protect religious institutions from historic preservation laws that substantially burden those institutions was held unconstitutional.[90] Congress

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background paper by D. Listokin). On the constitutional issues in historic-preservation zoning, see generally Bowers, Historic Preservation Law Concerning Private Property, 30 Urban Law. 405, 424–36 (1998); Fleming, Back to the Future: The Role of Historic Preservation in Assigning a Minor Part to the Taking Issue in the Land Use Drama, 17 Stetson L. Rev. 689 (1988); Netherton, The Due Process Issue in Zoning for Historic Preservation, 19 Urban Law. 77 (1987).

Legislation establishing historic *districts* may sometimes be invalidated as denying due process or equal protection if it allows selected property owners within the district to enter into contracts with the city that other affected property owners are not allowed to enter. See Native American Rights Fund, Inc. v. City of Boulder, 97 P.3d 283 (Colo. App. 2004), cert. denied 2004 WL 1814003 (Colo.2004) (provision in ordinance establishing historic district that allowed city to enter into privately negotiated contracts with selected property owners in district deprived other affected property owners of due process and was invalid). See generally Note, Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations, 116 Yale L.J. 768 (2007). See also Note, What's It to You? Citizen Challenges to Landmark Preservation Decisions and the Special Damage Requirement, 113 Colum. L. Rev. 447 (2013).

[89] The Washington Supreme Court once ruled than an historic preservation ordinance allowing designation of a church's exterior as an historic landmark, thus requiring the church to obtain governmental approval before making structural changes thereto, violated the "free exercise" clause of the First Amendment of the U.S. Constitution. First Covenant Church v. City of Seattle, 114 Wash.2d 392, 787 P.2d 1352 (1990). But the judgment was vacated and the case remanded by the U.S. Supreme Court. 499 U.S. 901, 111 S.Ct. 1097, 113 L.Ed.2d 208 (1991), on remand 120 Wash.2d 203, 840 P.2d 174 (1992) (vacated and remanded in light of Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), reh. denied 496 U.S. 913, 110 S.Ct. 2605, 110 L.Ed.2d 285 (1990) (free exercise clause of First Amendment doesn't prohibit application of state drug laws to ceremonial ingestion of peyote)). Cf. Rector, Wardens, and Members of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir.1990), cert. denied 499 U.S. 905, 111 S.Ct. 1103, 113 L.Ed.2d 214 (1991) (municipality's application of its landmarks law to require preservation of a church's auxiliary services building was not an unconstitutional infringement on free exercise of religion nor an unlawful taking of property); Open Door Baptist Church v. Clark County, 140 Wash.2d 143, 995 P.2d 33 (2000) (requiring church to apply for conditional use permit in rural estate zoning district was not an impermissible burden on free exercise of religion). But cf. Society of Jesus v. Boston Landmarks Comm'n, 409 Mass. 38, 564 N.E.2d 571 (1990) (designation of interior of church as historic landmark held to violate *state* constitution's guarantee of free exercise of religion). See generally Carmella, Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review, 36 Villanova L. Rev. 401 (1991): Kelster, Supreme Court Rules for Preservation, Historic Preservation News, April, 1991, at 1; Weinstein, The Myth of Ministry vs. Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions, 65 Temple L. Rev. 91 (1992); White & Keatings, Report of the Subcommittee on Historic Preservation and Architectural Control Law, 23 Urban Law. 699, 727–32 (1991); Note, Fire and Brownstone: Historic Preservation of Religious Properties and the First Amendment, 33 Boston C.L.Rev. 93 (1991); Note, Religious Landmarks, Guidelines for Analysis: Free Exercise, Takings and Least Restrictive Means, 53 Ohio St. L.J. 211 (1992); Comment, For Whom the Bell Tolls: Religious Properties as Landmarks Under the First Amendment, 8 Pace Envtl. L. Rev. 579 (1991); Comment, Landmarking Religious Institutions: The Burden of Rehabilitation and the Loss of Religious Freedom, 28 Urban Law. 327 (1996). See also Note, Landmarks as Cultural Property: An Appreciation of New York City, 44 Rutgers L. Rev. 427 (1992). Compare Comment, An Empirical Look at Churches in the Zoning Process, 116 Yale L.J. 859 (2007). The *Open Door Baptist Church* case, *supra*, is well-analyzed in Note, Religious Land Use Jurisprudence, 26 Seattle U.L. Rev. 365 (2002). For an alternative approach, see Monk (student) & Tyler, The Application of Prior Restraint: An Alternative Doctrine for Religious Land Use Cases, 37 U. Toledo L. Rev. 747 (2006). As to zoning of religious uses in general, see Giaimo & Lucero, Religious Land Uses, Zoning, and the Courts (American Bar Assn. Section of State & Local Govt. 2009); Symposium, God and the Land: Conflicts Over Land Use and Religious Freedom, 2 Albany Gov't L. Rev. 354–652 (2009). See also Dalton, Litigating Religious Land Use Cases (2nd ed. ABA Section of State and Local Government 2016); Note, Direct Government Grants to Churches for Façade Improvements, 86 U. Detroit Mercy L. Rev. 509 (2009). As to the basic power to zone educational and religious institutions, see Section 117, notes 12–13, and accompanying text.

[90] On the unsuccessful attempt by Congress to provide protection to religious institutions from application of historic preservation, or other, laws that substantially burden free exercise of religion, see Drinan, Reflections on the Demise of the Religious Freedom Restoration Act, 86 Geo. L.J. 101 (1997), noting City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), in which the Supreme Court invalidated the Religious Freedom Restoration Act, 42 U.S.C. 2000bb (1994). See generally Williamson, *City of Boerne v. Flores* and the Religious Freedom Restoration Act: The Delicate Balance Between Religious

responded with another statute providing more limited protection to religious uses.[91] In an opinion that, in general terms, recognizes the power of a city to preserve its desirable

Freedom and Historic Preservation, 13 J. Land Use & Envtl. L. 107 (1997); Symposium on *City of Boerne v. Flores*, 39 Wm. & M.L. Rev. 597–960 (1998). See also Comment, Why Free Exercise Jurisprudence in Relation to Zoning Restrictions Remains Unsettled After *Boerne v. Flores*, 52 SMU L. Rev. 305 (1999); Comment, The Free Exercise Clause and Historic Preservation Law: Suggestions for a More Coherent Free Exercise Analysis, 72 Tulane L. Rev. 1767 (1998); Note, When Thirteen Is (Still) Greater Than Fourteen: The Continued Expansive Scope of Congressional Authority Under the Thirteenth Amendment in a Post-*City of Boerne v. Flores* World, 102 Va. L. Rev. 501 (2016). For discussion of what the Religious Freedom Restoration Act was intended to do, see Comment, Zoning and Religion: Will the Religious Freedom Restoration Act of 1993 Shift the Line Toward Religious Liberty?, 45 Am. U.L. Rev. 199 (1995). On the place of the *City of Boerne case, supra*, in the law, see Colker, *City of Boerne* Revisited, 70 U. Cin. L. Rev. 455 (2002). See generally McAward, The Scope of Congress's Thirteenth Amendment Enforcement Power After *City of Boerne v. Flores*, 88 Wash. U.L. Rev. 77 (2010). See also Lee, The Trouble With *City of Boerne* and Why It Matters for the Fifteenth Amendment as Well, 90 Denver U.L. Rev. 483 (2012).

[91] In 2000, Congress adopted the Religious Land Use and Institutionalized Persons Act (RLUIPA) in an attempt to respond to concerns raised by the Supreme Court in the *Boerne* case *supra* note 90, but still provide protections for religious uses. 42 U.S.C. § 2000cc (2005). The Act prohibits local land-use regulations from imposing a "substantial burden" on religious land use absent a compelling reason, and forbids treating religious activities on "less than equal terms" than their secular counterparts.

As to the "substantial burden" proviso, see Note, Abandoning the Use of Abstract Formulations in Interpreting RLUIPA's Substantial Burden Provision in Religious Land Use Cases, 36 Colum. J. L. & Arts 283 (2013); Comment, *Hobby Lobby* and *Hobbs* to the Rescue: Clarifying RLUIPA's Confusing Substantial Burden Test for Land Use Cases, 24 Geo. Mason L. Rev. 1025 (2017); Note, A Defining Case for the Substantial Burden Test Under RLUIPA, 23 Pace Envtl. L. Rev. 263 (2005–06). Cf. Chabad Lubavitch of Litchfield County Inc. v. Litchfield Historic Dist. Comm'n, 768 F. 3d 183 (2d Cir. 2014) (Connecticut land use regulation is subject to substantial burden provision of RLUIPA because it requires local commissions to accept or deny applications based on subjective standards, creating possibility of religious discrimination). For discussion of the "equal terms" provision of the Act, see Mosley, Zoning Religion Out of the Public Square: Constitutional Avoidance and Conflicting Interpretations of RLUIPA's Equal Terms Provision, 55 Ariz. Rev. 465 (2013); Comment, Equally Confused: Constructing RLUIPA's Equal Terms Provision, 41 Ariz. St. L. J. 1139 (2009); Note, Restoring RLUIPA's Equal Terms Provision, 58 Duke L. J. 1071 (2009); Note, A Circuit Split: Interpretation of the Equal Terms Provision of the Religious Land Use and Institutionalized Persons Act, 34 Seton Hall Legis. J. 57 (2009); Note, We're on a Mission From God: Properly Interpreting RLUIPA's "Equal Terms" Provision, 86 St. John's L. Rev. 715 (2012); Comment, Equal Terms: What Does It Mean and How Does It Work, 80 U. Cin. L. Rev. 179 (2011); Comment, Zoned Secular: Seattle's Prohibition of New Religious Facilities in Industrial Zones Violates the RLUIPA's "Equal Terms" Rule, 81 Wash. L. Rev. 191 (2006). See generally Note, The Role of Economics in the Discourse on RLUIPA and Nondiscrimination in Religious Land Use, 53 Boston Coll. L. Rev. 1089 (2012); Wallwork, Legislating the Free Exercise Clause: Congressional Power and the Religious Land Use and Institutionalized Persons Act of 2000, 5 Faulkner L. Rev. 1 (2013–14). As to the possible effect of RLUIPA on cemeteries, see Note, Bring Our Your Dead: An Examination of the Possibilities for Zoning Out Cemeteries Under RLUIPA, 24 N.Y.U. Envtl. L. J. 111 (2016).

As to the possible effect of the RLUIPA on eminent domain actions, see Serkin & Tebbe, Condemning Religion: RLUIPA and the Politics of Eminent Domain, 85 Notre Dame L. Rev. 1 (2009); Comment, RLUIPA and Eminent Domain: Probing the Boundaries of Religious Land Use Protection, 2008 B.Y.U. L. Rev. 1213; Note, Taking the Temple: Eminent Domain and the Limits of RLUIPA, 96 Geo. L. J. 2057 (2008). On the effects the RUILPA may have on special relief—such as variances and special use permits—in zoning cases, see Comment, RLUIPA and the Individualized Assessment: Special Use Permits and Variances Under Strict Congressional Scrutiny, 31 U. Hawaii L. Rev. 257 (2008). On RUILPA's effects on land use in general, see Dalton, Recent Developments in RLUIPA and Religious Land Use, 46 Urban Law. 849 (2014); Lennington, Thou Shall Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions, 29 Seattle U.L. Rev. 805 (2006); Silverberg, The Application of RLUIPA to Land Use Regulation, 28 State & Local L. News, Summer, 2005 at 1; Weinstein, The Effects of RLUIPA's Land Use Provisions on Local Governments, 39 Fordham Urb. L. J. 1221 (2012); Note, Individualized vs. Generalized Assessments: Why RLUIPA Should Not Apply to Every Land-Use Request, 62 Duke L. J. 79 (2012); Juergensmeyer & Roberts, Land Use Planning & Development Regulation Law 477–78 (West Hornbook Series 2003). As to possible application of RLUIPA to liquor regulation, see Comment, Land, Libations, and Liberty: RLUIPA and the Specter of Liquor Control Laws, 49 Idaho L. Rev. 157 (2012); Symposium, My Religion, My Rules: Examining the Impact of RFRA Laws on Individual Rights, 79 Alb. L. Rev. 621–704 (2015–2016). See also on RLUIPA, Santoro, Section Five of the Fourteenth Amendment and RLUIPA, 24 Whittier L. Rev. 493 (2002); Note, RLUIPA: What's the Use?, 17 Mich. J. Race & L. 359 (2012); Comment, The Religious and Institutionalized Persons Act of 2000: Congress' New Twist on "Speak Softly and Carry a Big Stick," 34 Urban Law. 829 (2002). See also Goldfien, Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious

aesthetic and cultural features, the U.S. Supreme Court has upheld designation and preservation of landmarks through zoning restrictions, so long as the owners are not prevented from earning a reasonable rate of return on their investment.[92]

Land Use Disputes, 2006 J. Disp. Resol. 435; Salkin & Lavine, The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government, 40 Urban Law. 195 (2008). As to doubts on the constitutionality of RLUIPA, see Note, RLUIPA's Land Use Provisions: Congress' Unconstitutional Response to *City of Boerne*, 28 Environs 155 (2004).

Some states have enacted statutes—often modeled on the Religious Freedom Restoration Act of the federal government that was ruled unconstitutional in the *Boerne* case, *supra* note 90—relevant to zoning of religious uses. See Dalton, Recent Developments: RLUIPA Land Use Update, 47 Urban Law. 419 (2015) (noting that in 2014 many states considered, and some enacted, Religious Freedom Restoration Acts in anticipation of U.S. Supreme Court decision finding a constitutional right to same sex marriage); Note, The Constitutional Standard for Zoning Cases Under the Texas Religious Freedom Restoration Act, 6 Tex. Forum on Civ. Liberties & Civ. Rights 365 (2002). Some state constitutions contain provisions forbidding state and local governments from imposing a substantial burden on a religious body. See City of Woodinville v. Northshore United Church of Christ, 166 Wash. 2d 633, 211 P.3d 406 (2009) (city's moratorium on all land use permit applications placed a substantial burden on church in violation of church's right to religious freedom under state constitution). See also Comment, The California Missions Preservation Act: Safeguarding Our History or Subsidizing Religion?, 55 Am. U.L. Rev. 1523 (2006). For a *state* court application of the *federal* Religious Land Use and Institutionalized Persons Act of 2000, discussed *supra*, see Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 192 Or.App. 567, 86 P.3d 1140 (2004), aff'd, 338 Or. 453, 111 P.3d 1123 (2005) (federal act does not provide that religious entities are entirely exempt from land-use regulations but only precludes imposition or implementation of land-use regulations in a way that imposes a substantial burden on the entity, unless the government demonstrates that the burden is the least restrictive means of furthering a compelling governmental interest). It has been suggested that the Religious Land Use and Institutionalized Persons Act of 2000 revives the bifurcated approach to judicial review of zoning regulations that the U.S. Supreme Court applied in the early years of zoning, with facial challenges being viewed under *Village of Euclid's* highly deferential rational basis standard, and as-applied challenges being more strictly scrutinized, as in the *Nectow* case, note 14 *supra*. Ostrow, Judicial Review of Local Land Use Decisions: Lessons from RLUIPA, 31 Harv. J.L. & Public Pol'y 717 (2008).

[92] Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) reh. denied 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198. See Preservation News, Aug., 1978, at 1, col. 1 (hailing the victory, which involved historic-landmark status for Grand Central Station); Preservation News, March, 1975, at 1, noting earlier setbacks in the effort to designate Grand Central Station a landmark. See generally Lang, *Penn Central Transportation Co. v. New York City*: Fairness and Accommodation Show the Way Out of the Takings Corner, 13 Urban Law. 89 (1981); Serkin, *Penn Central* Take Two, 92 Notre Dame L. Rev. 913 (2016); Note, *Penn Central* 2.0: The Takings Implications of Printing Air Rights, 2015 Colum. Bus. L. Rev. 1120; Comment, "Every Sort of Interest": *Penn Central* and the Right to Community-Making Places, 19 U. Pa. J. Const. L. 767 (2017). Compare Wade, *Penn Central's* Ad Hocery Yields Inconsistent Takings Decisions, 42 Urban Law. 549 (2010). As to the eventual preservation and renovation of Grand Central Station, see Haberman, Looking Out on Grand Central, and Looking Back on Saving It, N.Y. Times, Jan. 28, 2013, at 415. See generally 2011 Fitch Forum, 45 Years of Preservation Law: New York City and the Nation, the Past, and the Future, 18 Widener L. Rev. 123 (2012). It seems that a "taking" will still be found if the "landmark" designation results in an owner's being unable to put his property to any profitable use. See Benenson v. United States, 548 F.2d 939 (Ct.Cl. 1977) (Willard Hotel in Washington, D.C.); Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 359 N.Y.S.2d 7, 316 N.E.2d 305 (1974). Of course, a governmental authority may always, if it can afford to, purchase historical property in order to preserve it; it has been said that the historical movement in America got its start in 1850 when the State of New York purchased Hasbrouck House—the Newburgh, New York, headquarters of George Washington during the Revolutionary War. See Note, Urban Landmarks, *supra* note 88, at 521, citing Lutheran Church in America v. City of New York, *supra*. And the power of eminent domain has been upheld where used for the purpose of preserving historical property. United States v. Gettysburg Electric Railway, 160 U.S. 668, 16 S.Ct. 427, 40 L.Ed. 576 (1896) (federal taking of Gettysburg battlefield); State ex rel. Smith v. Kemp, 124 Kan. 716, 261 P. 556 (1927) (condemnation of historic Shawnee Mission); Flaccomio v. Mayor and City Council, 194 Md. 275, 71 A.2d 12 (Ct.App.1950) (condemnation of Baltimore's Star-Spangled Banner Flag House upheld though was to be operated by private association; house is where the flag was made that flew at Ft. McHenry, inspiring Francis Scott Key to write the national anthem); Attorney General v. Williams, *supra* note 87. See Application of Department of Archives and History, 246 N.C. 392, 98 S.E.2d 487 (1957), saying the state legislature could declare restoration of Tyron's Palace to have a public purpose and could authorize use of eminent domain therefor. See generally Montague, Planning for Preservation in Virginia, 51 Va.L.Rev. 1214 (1965); Phelps, Reevaluating the Role of Acquisition-Based Strategies in the Greater Historic Preservation Movement, 34 Va. Envtl. L. J. 399 (2016); Wilson & Winkler, The Response of State Legislation to Historic Preservation, 36 Law & Contemp. Prob. 309 (1971).

Federal legislation, the National Historic Preservation Act of 1966, 16 U.S.C.A. § 470, provides for a National Register of Historic Places, as to which matching grants-in-aid can be made available for preservation efforts (§ 470a), and as to which limits are imposed regarding federal projects affecting the listed properties (§ 470f). See Shull & Shull, New Inroads for Historic Preservation, 26 Ad.L.Rev. 357 (1974). As of amendments in 1980 to the National Registry legislation, a private property can be listed only if the owner does not object. See "Register Closed to Private Sites," Preservation News, March, 1981, at 1. For 11 months, the Register was closed to private properties altogether, while new regulations were drafted; it was reopened in November, 1981. See Preservation News, Dec., 1981, at 1. On the 1980 legislation, see generally " 'Lame Ducks' Compromise, Pass 3 Major Bills," Preservation News, Jan., 1981, at 1. As to how the National Register of Historic Places is operated—including its history and how the correct name for it is Register, not Registry—see "What Is the National Register?," Preservation magazine, May/June, 2011, at 38. Some states also have a register of historic properties and encourage state agencies to rent office space in such buildings. See Leccese, New York Succeeds Second Time Around, Preservation News, Sept., 1980, at 1.

On the effects that the *Penn Central* case, *supra*, had on the general law of regulatory takings, see Claeys, The *Penn Central* Test and Tensions in Liberal Property Theory, 30 Harv. Envtl. L. Rev. 339 (2006); Hubbard, Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of *Penn Central Transportation Company?*, 14 Duke Envtl. L. & Pol'y F. 121 (2003); Comment, Substantially Advancing *Penn Central*: Sharpening the Remaining Arrow in the Property Advocate's Quiver for the New Age of Regulatory Takings, 30 Nova L. Rev. 445 (2006). For a critique of the *Penn Central* case, see Echeverria, Is the Penn Central Three-Factor Test Ready for History's Dustbin?, 1 Land Use L. & Zoning Digest 3 (2000). On the use of the concept of "investment-backed expectations" to determine whether or not a taking has occurred, see Eagle, The Rise and Rise of "Investment-Backed Expectations," 32 Urban Law. 437 (2000). As noted in this article, the concept originated in Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967), and became part of constitutional jurisprudence in the *Penn Central* case, *supra*. See generally on the *Penn Central* test note 41, *supra*, and accompanying text. See also Breemer, Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)reasonable in State Courts?, 38 Urban Law. 81 (2006). As to transferrable-development rights, see generally paragraph 6 of this note, *infra*.

Many private groups have also, of course, performed outstanding work in preserving historic properties; an early example was provided by the Mount Vernon Ladies' Association, which purchased George Washington's home in 1859. See Note, Urban Landmarks, *supra* note 88, at 521 & note 3. See generally Johnson, How the Girls Saved Mount Vernon, Sat. Eve. Post, Feb. 21, 1953, at 24. See also Balzer, The Savannah Spectrum, Travel/Holiday, Oct., 1980, at 48, 51, describing how seven Savannah women initiated efforts that led to today's large-scale preservation of that city's historic sites. On the work of the National Trust for Historic Preservation—particularly the Endangered Properties Program—, see Anthony, Last Hope for Landmarks, Historic Preservation magazine, March/April, 1981, at 22. On the National Trust's Main Street Program, aimed at revitalizing historic downtown areas in towns and small cities, see Keister, Main Street Makes Good, Historic Preservation, Sept./Oct., 1990, at 44. See generally Walser, City Love, Historic Preservation magazine, Fall 2016, at 36; Meeks, The Past and Future City: How Historic Preservation Is Reviving America's Communities (Island Press 2016). Compare Note, Historic Preservation in Southeast Asia: The Role of Public-Private Partnerships, 39 Vanderbilt J. Transnat'l L. 1013 (2006). See also Note (R. Marlin Smith Student Writing Competition Winner), Preservation of Historic Properties' Environs, 36 Urban Law. 137 (2004).

An excellent symposium on historic preservation is found in 12 Urban Lawyer 3–101 (1980). The significance of that symposium, the efforts of the American Bar Association Committee on Housing and Urban Development Law, and the nature of future programs likely to be undertaken in the area of historic preservation are discussed in Waters & Scott, The Need for Expanded Initiatives: An Overview of the ABA Special Symposium on Preserving, Conserving, and Re-Using Historic Properties, 12 Urban Law. 413–28 (1980).

Transferrable-development-rights programs, allowing certain property owners to convey to other property owners the formers' unused potential under the zoning laws (such as unused potential for maximum building size, height, etc.) have been employed in some communities to encourage historic preservation. For instance, under the Denver program, owners of historic buildings have been able to sell their unused development rights and have thus obtained funds for renovation of their own structures. See Reichhardt, Will New Denver Zoning Become National Model?, Preservation News, Feb., 1983, at 1. See generally Been & Infranca, Transferrable Development Rights Programs: "Post-zoning"?, 78 Brooklyn L. Rev. 435 (2013); Delaney, Kominers & Gordon, TDR Redux: A Second Generation of Practical Legal Concerns, 15 Urban Law. 593 (1983); Miller, Transferrable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?, 39 Nat. Resources J. 459 (1999); Williams, Coastal TDRs and Taking in a Changing Climate, 46 Urban Law. 139 (2014); Note, Transferrable Development Rights and the Deprivation of All Economically Beneficial Use: Can TDRs Salvage Regulations That Would Otherwise Constitute a Taking?, 34 Idaho L. Rev. 679 (1998); Note, Caught Between Scalia and the Deep Blue Lake: The Takings Clause and Transferrable Development Rights Programs, 83 Minn. L. Rev. 815 (1999); Comment, Transferring

Development Rights: Purpose, Problems, and Prospects in New York, 17 Pace L. Rev. 319 (1996); Comment, Past, Present, and Future Constitutional Challenges to Transferrable Development Rights, 74 Wash. L. Rev. 825 (1999). See also Juergensmeyer, Nicholas & Leebrick, Transferrable Development Rights and Alternatives after *Suitum*, 30 Urban Law. 441 (1998), commenting particularly on Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997), which involved transferrable development rights but was decided on narrow ripeness grounds. Further comment on Supreme Court authority is found in Note, Exploiting Ambiguity in the Supreme Court: Cutting Through the Fifth Amendment With Transferrable Development Rights, 58 Wm. & Mary L. Rev. 285 (2016). It has also been suggested that transferrable development rights could be useful in dealing with rising waters caused by global warming. See Depasquale, A Pragmatic Proposition: Regionally Planned Coastal TDRs in Light of Rising Seas, 48 Urban Law. 179 (2016). Compare Tweedy v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals, 332 P. 3d 12 (Alaska 2014) (town ordinance creating a shoreline-setback requirement does not violate property owner's rights where he had enlarged a nonconforming use in violation of the ordinance). A good discussion of the history of transferrable development rights in New York City is found in Kruse, Constructing the Special Theater Subdistrict: Culture, Politics, and Economics in the Creation of Transferrable Development Rights, 40 Urban Law. 95 (2008) (24th Smith-Babcock-Williams Student Writing Competition Winner). As to the Miami program, see Note, Preserving Miami: An Evaluation of Miami's Transferrable Development Rights Program, 24 U. Fla. J. L. & Pub. Pol'y 271 (2013). See also Scro, Navigating the Takings Maze: The Use of Transfers of Development Rights in Defending Regulations Against Takings Challenges, 19 Ocean & Coastal L. J. 219 (2014).

Tax incentives have been much discussed, and sometimes employed, as a method of encouraging historic preservation. See Powers, Tax Incentives for Historic Preservation, 12 Urban Lawyer 103 (1980). See also Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 Harv.L.Rev. 574 (1972). On the historical development of tax incentives for historic preservation, see Listokin, Landmarks Preservation and the Property Tax (Center for Urban Policy Research 1982). On the particular provisions of the Economic Recovery Tax Act of 1981 that provide incentives for the rehabilitation of older and historic buildings, see Schulman, The Certified Historic Structure: An Aid to Neighborhood Conservation and Low-Income Housing, 14 Urban Law. 765 (1982), in Fernsler & Tuttle, Recent Developments in Housing and Community Development 14 Urban Law. 745 (1982). On the lessening of incentives toward historic preservation under the Tax Reform Act of 1986, see "Rehab Takes a Fall," Historic Preservation, Sept./Oct., 1990, at 51. See also Roddewig, Preservation Easement Law: An Overview of Recent Developments, 18 Urban Law, 229 (1986); Williams, Historic Preservation Easements—The Benefits and Burdens Associated With the Donation of an Easement on an Historic Structure, 57 Okla. B.A.J. 749 (1986), discussing the tax benefits of donating historic preservation easements. On preservation easements in general, see Phelps, Preserving Preservation Easements?: Preservation Easements in an Uncertain Regulatory Future, 91 Neb. L. Rev. 121 (2012).

On the development of the law concerning air rights, a subject involved in the *Penn Central* litigation *supra*, see Schnidman & Roberts, Municipal Air Rights: New York City's Proposal to Sell Air Rights over Public Buildings and Public Spaces, 15 Urban Law. 347 (1983). On developments as to the air rights over Grand Central Terminal, see Horsley, Air Rights Bought at Grand Central, N.Y. Times, Nov. 26, 1983, at 1, col. 1. On the significant contributions to land-use and historic-preservation law—in particular the *Penn Central* decision *supra*—made by Justice William Brennan during his years on the U.S. Supreme Court, see Haar & Kayden, Landmark Justice: The Influence of William J. Brennan on America's Communities (Preservation Press 1989). For an interesting contrast to the *Penn Central* case, see United Artists Theater Circuit, Inc. v. City of Philadelphia, 528 Pa. 12, 595 A.2d 6 (1991), where the court invalidated—as a "taking" without compensation—provisions of a municipal code which authorized historic landmark designation of private property and accompanying restrictions on use without consent of the owner. But the Pennsylvania court subsequently reversed itself on rehearing and ruled that historic designation is a valid use of government powers and does not necessarily effect a taking. United Artists' Theater Circuit, Inc. v. City of Philadelphia, 535 Pa. 370, 635 A.2d 612 (1993). See generally White & Keatings, Recent Developments in Historic Preservation and Architectural Control Law, 26 Urban Law. 777, 790–93 (1994), discussing both of the *United Artists'* opinions. See also Wade, *Penn Central's* Economic Failings Confounded Takings Jurisprudence, 31 Urban Law. 277 (1999). On the attempts sometimes now made to undo landmark designations, see Yelin, Routes to Landmark "De-Designation": An Analysis of Selected Cases, 22 Urban Law. 307 (1990).

An excellent summary of the background of, and litigation over, historic preservation laws is found in Annot., Validity and Construction of Statute or Ordinance Protecting Historical Landmarks, 18 A.L.R.4th 990 (1982), noting, at 995, that all 50 states and more than 500 municipalities have enacted laws to encourage or require preservation of historic or aesthetic buildings and areas. A good article specifically dealing with *local* efforts at historic preservation over the years, and judicial challenges to those efforts, is Smith, Judicial Review of Historic and Landmark Preservation Ordinances, 15 Urban Law. 555 (1983). On a particularly successful effort at rehabilitating and reusing historic structures, see Freeman, Lessons from Lowell, Historic Preservation, Nov./Dec., 1990, at 32, discussing rehabilitation in Lowell, Massachusetts. See generally Martin, Adaptive Use (Urban Law Institute 1980), reviewed 25 Urban Law. 695 (1993); Murtagh, Keeping Time: The

A few other grounds are occasionally cited as legitimate reasons for zoning, or as adding weight to the arguments for a particular zoning ordinance's validity. Preserving scenic beauty, in areas of natural attractiveness, is sometimes cited; and the trend is to allow this as a sufficient reason, in accord with the general trend on aesthetics.[93] Enhancing the tax base of a community is clearly *not* a valid purpose by itself for zoning, but is occasionally mentioned as a "make-weight" or additional argument for validity where other purposes, such as improving property values and promoting homogeneity, are present.[94] The promotion of morals was mentioned in some older cases regarding regulation of billboards—because immoral activities were thought to take place behind them;[95] and in more recent times, it has been held that promotion of morality may justify "spacing" requirements as to the location of adult movie theatres, liquor establishments, etc.[96] Set-back ordinances (which require that structures be located a certain distance

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History and Theory of Preservation in America (Main Street Press 1988). On the vagueness problems that sometimes plague historic preservation legislation, see Comment, Florida's Local Historic Preservation Ordinances: Maintaining Flexibility While Avoiding Vagueness Claims, 25 Fla. St. U.L. Rev. 1017 (1998).

On possible conflicts between historic preservation efforts and disability access, see Comment, A Comparative Analysis of the Tension Created by Disability Access and Historic Preservation Laws in the United States and England, 22 Conn. J. Int'l L. 379 (2007). Regarding other exceptions to, or conflicts with, the law, see Note, Engineering Exceptions to Historic Preservation Law: Why the Army Corps of Engineers' Section 106 Regulations Are Invalid, 40 Wm. Mitchell L. Rev. 1580 (2014).

[93] See National Advertising Co. v. County of Monterey, 211 Cal.App.2d 375, 27 Cal.Rptr. 136 (1962) (sign-control case); Opinion of Justices, 103 N.H. 268, 169 A.2d 762 (1961) (maintenance of natural beauty along highways can be considered by legislature). Cf. L.C. Canyon Partners v. Salt Lake County, 266 P.3d 797 (Utah 2011), recognizing legitimate government objectives in protecting the foothills and canyon areas of a county; *id.* at 800. The Federal Highway Beautification Act of 1965, 23 U.S.C.A. § 131, provides incentives for states which prohibit advertising structures (other than those advertising goods or services offered on the premises where the sign is located) near interstate highways. See generally Williams, Legal Techniques to Protect and to Promote Aesthetics Along Transportation Corridors, 17 Buff.L.Rev. 701 (1968). See also Lamm & Yosinow, The Highway Beautification Act of 1965: A Case Study in Frustration, 46 Denver L.J. 437 (1969). As to environmental concerns in land-use law, see generally Colburn, Localism's Ecology: Protecting and Restoring Habitat in the Suburban Nation, 33 Ecology L.Q. 945 (2006); Symposium, The Intersection of Environmental and Land Use Law: A Special Edition of the Pace Environmental Law Review, 23 Pace Envtl. L. Rev. 671–1018 (2006).

[94] See Gruber v. Raritan Township, 39 N.J. 1, 186 A.2d 489 (1962). A zoning ordinance cannot be justified merely on the ground it will reduce taxes, as by lowering expenses for education, unless it is supported by some other valid ground. See Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), appeal dism'd cert. denied 423 U.S. 808, 96 S.Ct. 18, 46 L.Ed.2d 28 (bedroom restriction attempting to limit number of families with children in community). See also, on attempts to exclude children, note 68 *supra* and accompanying text. Compare, as to the effects that tax law may have on land development, McElfish, Taxation Effects on Land Development and Conservation, 22 Temple Envtl. L. & Tech. J. 155 (2004).

[95] See Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 529, 37 S.Ct. 190, 191, 61 L.Ed. 472 (1917) (noting that billboards shield immoral practices); General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N.E. 309 (1930). Cf. Hav-A-Tampa Cigar Co. v. Johnson, 149 Fla. 148, 5 So.2d 433 (1941) (regulation of signboards along highways held constitutional as promoting public safety and general welfare). Massachusetts has held that, under state constitutional authority, advertising in public places and within public view may be regulated on grounds of taste and fitness. General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 193 N.E. 799 (1935), appeals dism'd 296 U.S. 543, 56 S.Ct. 95, 80 L.Ed. 385, 297 U.S. 725, 56 S.Ct. 495, 80 L.Ed. 1008, interpreting Mass.Const. art. 50 (1979). See Gardner, The Massachusetts Billboard Decision, 49 Harv.L.Rev. 869 (1936). See generally Wilson, Billboards and the Right to Be Seen from the Highway, 30 Geo.L.J. 723 (1942); Annot., Validity and Construction of State or Local Regulation Prohibiting the Erection or Maintenance of Advertising Structures Within a Specified Distance of Street or Highway, 81 A.L.R.3d 564 (1977). As to morality as a proper purpose of zoning laws, see generally Smith & Bailey, Regulating Morality Through the Common Law and Exclusionary Zoning, 60 Catholic U. L. Rev. 403 (2011).

[96] See Young v. American Mini Theatres, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), reh. denied 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (upholding, against First and Fourteenth Amendment attacks, ordinances prohibiting operation of any "adult" movie theatre, bookstore, etc. within 1000 feet of any other such establishment, or within 500 feet of a residential area); Mazo v. City of Detroit, 9 Mich.App. 354,

156 N.W.2d 155 (1968) (ordinance prohibiting establishment of a bar within 1000 feet of another upheld). But see Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (ordinance excluding live entertainment, including nude dancing, *throughout* a borough could not be justified against First Amendment attack); Pringle v. City of Covina, 115 Cal.App.3d 151, 171 Cal.Rptr. 251 (Dist.Ct.1981) (ordinance barred exhibition within 500 feet of residential area of material characterized by emphasis on certain sexual activities, etc.; but court refused to ban such films completely, as would irreparably injure owners of theatre—occasional showings would be allowed). Cf. Williams v. City & County of Denver, 198 Colo. 573, 607 P.2d 981 (1979) (lower court had struck down restrictions on adult bookstores and theatres; court here holds those portions not severable from rest of ordinance). See generally Annot., Validity of "War Zone" Ordinances Restricting Location of Sex-Oriented Businesses, 1 A.L.R. 4th 1297 (1980). In City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), the Court upheld an ordinance barring more than one adult entertainment business in the same building. As to the application of motive review to zoning restrictions on adult businesses, see Swiney, Applying Legal Expressivism to Motive Review of Adult-Use Zoning, 36 Capital U. L. Rev. 769 (2008). The *Los Angeles* case, *supra*, was relied on in Annex Books, Inc. v. City of Indianapolis, 740 F. 3d 1136 (7th Cir. 2014), finding unconstitutional an ordinance requiring adult bookstores, but not other businesses, to close between midnight and 10 a.m., and all day on Sunday, in order to reduce the secondary effect of armed robberies. In *Los Angeles*, Justice Kennedy had written that a city may not regulate the secondary effects of speech by suppressing the speech itself; *supra* at 427. See Note, 46 Urban Law. 706 (2014).

While in the *Young* and *Los Angeles* cases *supra*, the Court upheld an attempt to *disperse* adult uses, attempts by a community to *concentrate* such uses in limited areas have also been found valid. City of Renton v. Playtime Theatres, Inc. 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), reh. denied 475 U.S. 1132, 106 S.Ct. 1663, 90 L.Ed.2d 205 (1986) (ordinance prohibited adult motion picture theaters from locating within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park or school; upheld as valid time, place and manner restriction on speech); Pangaea Cinema, LLC, 310 P.3d 604 (N.M. 2013) (cities may use zoning to disperse adult businesses or to concentrate them, consistent with the right to free speech). Thus, it is left to the political judgment of the community whether to use the dispersal or concentration method, if any method is used at all. But any type of "spacing" restriction is subject to challenge on grounds of vagueness. See Harris Books, Inc. v. City of Santa Fe, 98 N.M. 235, 647 P.2d 868 (1982) (ordinance forbidding location of adult bookstore within 1000 feet of residential area unconstitutionally vague where "residential area" not defined). Or on the ground of delegating governmental power to private individuals or entities. See Larkin v. Grendel's Den, Inc., 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982) (statute vesting in the governing bodies of churches and schools the power to veto liquor licenses within 500-foot radius of the church or school delegates governmental power to private entities and violates Establishment Clause of First Amendment). Or on the ground of overbroadly infringing on free speech. See Pensack v. City & County of Denver, 630 F.Supp. 177 (D.Colo.1986) (city's application of adult bookstore ordinance to bakery offering cakes with sexually explicit themes held unconstitutional). But the general validity of "spacing" restrictions now seems well established. See 15192 Thirteen Mile Road, Inc. v. City of Warren, 626 F.Supp. 803 (E.D.Mich.1985) (ordinance upheld that limited location of adult businesses to no closer than 500 feet from any residence and at least 1000 feet from any other adult use and that required location along a major thoroughfare; protection of quality of residential life held a sufficient justification for "spacing" restriction). Cf. National City v. Wiener, 3 Cal.4th 832, 12 Cal.Rptr.2d 701, 838 P.2d 223 (1992), cert. denied 510 U.S. 824, 114 S.Ct. 85, 126 L.Ed.2d 53 (1993) (ordinance effectively limiting adult bookstores to enclosed malls upheld). See generally Brody, When First Amendment Principles and Local Zoning Regulations Collide, 12 N. Ill. L. Rev. 671 (1992); Connolly (ed.), Local Government, Land Use and the First Amendment: Protecting Free Speech and Expression (ABA Section of State and Local Government 2017); Pearlman, Zoning and the First Amendment, 16 Urban Law. 217 (1984). See also Mandelker & Rubin (eds.), Protecting Free Speech and Expression—The First Amendment and Land Use Law (Section of State and Local Government, American Bar Ass'n 2002) (a collection of essays detailing various land-use topics and their interrelationship with the First Amendment), reviewed 35 Urban Law. 391 (2003).

For interpretation of the *Renton* case *supra*, see SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir.1988), aff'd on rehearing 841 F.2d 107 (5th Cir.1988) (city only needs to prove that ordinance is narrowly tailored to serve a substantial interest and leaves open alternative channels of communication). Cf. Town of Islip v. Caviglia, 141 A.D.2d 148, 532 N.Y.S.2d 783 (1988) (applying *Renton* test, court upholds ordinance restricting adult businesses to industrial zones, though "special exception" provision is invalidated for lack of adequate standards).

Some courts will uphold "spacing" restrictions applied to businesses protected by the First Amendment only if there is a showing of a real and immediate threat of substantial harm to the particular neighborhood. See City of Portland v. Tidyman, 306 Or. 174, 759 P.2d 242 (1988) (city ordinance imposing location and spacing restrictions on adult bookstores held an invalid restraint on free expression where ordinance did not specify the adverse effects that constituted nuisance attributable to sale of adult materials and therefore did not necessarily apply only where those adverse effects were shown to occur or imminently threaten to occur). See generally Roeseler, Regulating Adult Entertainment Establishments Under Conventional Zoning, 19 Urban

from public streets, ways, etc.), off-street parking requirements, and other zoning or quasi-zoning restrictions, are sometimes justified partly on the ground of promoting the speedy and safe movement of traffic.[97] Other safety considerations are among the

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Law. 125 (1987); Annot., Validity of Ordinances Restricting Location of "Adult Entertainment" or Sex-Oriented Businesses, 10 A.L.R.5th 538 (1993). See also Gerard, Local Regulation of Adult Businesses (West Group 1998). For critical examinations of "spacing" requirements, see Eckert, The Incoherence of the Zoning Approach to Regulating Pornography: The Exclusion of Gender and a Call for Category Refinement in Free Speech Doctrine, 4 Geo. J. Gender & L. 863 (2003); Note, Are We Losing the First Amendment, or Just Adult Businesses?, 12 Villanova Sports & Ent. L.J. 227 (2005).

In Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986), on remand 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492 (1986), the U.S. Supreme Court held constitutional the enforcement of a nuisance closure law to shut down an adult bookstore at its present location for a one-year period due to illicit sexual activities on the premises. But see World Wide Video, Inc. v. City of Tukwila, 117 Wash.2d 382, 816 P.2d 18 (1991), cert. denied 503 U.S. 986, 112 S.Ct. 1672, 118 L.Ed.2d 391 (1992), finding that adult businesses with predominantly take-home merchandise do not necessarily have the same harmful secondary effects traditionally associated with adult movie theaters and peep shows and therefore cannot, under the First Amendment, be subjected to the same severe zoning restrictions. See generally Cramer, Zoning Adult Businesses: Evaluating the Secondary Effects Doctrine, 86 Temple L. Rev. 577 (2014); Hudson, The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms," 37 Washburn L.J. 55 (1997); Comment, Preventing the Secondary Effects of Adult Entertainment Establishments: Is Zoning the Solution?, 12 J. Land Use & Envtl. L. 383 (1997). In Stringfellow's of New York, Ltd. v. City of New York, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407 (1998), the court upheld zoning ordinances that treated adult uses differently from other commercial uses due to the differing secondary effects. See Note, New York City's Restrictive Zoning of Adult Businesses: A Constitutional Analysis, 23 Fordham U.L.J. 187 (1995). See generally Note, Adult Uses and the First Amendment: The *Stringfellow's* Decision and Its Impact on Municipal Control of Adult Businesses, 15 Touro L. Rev. 241 (1998). As to secondary effects, see also Daniel, An Examination of the Assumption that Adult Businesses Are Associated with Crime in Surrounding Areas: A Secondary Effects Study in Charlotte, North Carolina, 38 Law & Soc'y Rev. 69 (2004). As to the creation of "anti-prostitution zones" in some cities, see Comment, Anti-prostitution Zones: Justifications for Abolition, 91 J. Crim. L. & Criminology 1101 (2001), discussing laws enacted or proposed in some Florida communities making mere presence in a "prostitution free zone" a probation violation for repeat offenders.

[97] Set-back requirements: See Moore v. City of Pratt, 148 Kan. 53, 79 P.2d 871 (1938); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925); State ex rel. Cataland v. Birk, 97 Ohio App. 299, 125 N.E.2d 748 (1953); Appeal of Kerr, 294 Pa. 246, 144 A. 81 (1928). See generally Note, Municipal Corporations—Validity of Set-Back Ordinance, 27 Mich.L.Rev. 959 (1929). Set-back ordinances may also be justified on aesthetic and economic grounds. See Weiner v. City of Los Angeles, 68 Cal.2d 697, 68 Cal.Rptr. 733, 441 P.2d 293 (1968) ("greenbelt" created; value of homes increased). See generally Matter of Schrader, 660 P.2d 135 (Okl. 1983) (setback ordinance as applied to owner of residential carport upheld against allegations that words "building" and "structure" in the ordinance were unduly vague).

Off-street parking requirements: Chambers v. Zoning Board of Adjustment, 250 N.C. 194, 108 S.E.2d 211 (1959) (necessary in order to protect children from traffic). See Citizens Association of Georgetown, Inc. v. District of Columbia Board of Zoning Adjustment, 337 A.2d 495 (D.C.1975) (ordinance required additional parking spaces to be provided by owner if another building added; terrace on restaurant held not a "building"). But see Ronda Realty Corp. v. Lawton, 414 Ill. 313, 111 N.E.2d 310 (1953) (improper classification found where off-street parking requirement applied to apartment houses but not to hotels or rooming houses). Cf. Stroud v. City of Aspen, 188 Colo. 1, 532 P.2d 720 (1975) (off-street parking requirements entitled to same presumption of validity as applies to any other zoning ordinances; but a requirement that property owner provide parking spaces himself or lease them from city, but which does not require city actually to provide such spaces, is overbroad).

Regulation of signs and advertising structures may also be justified on the ground of eliminating traffic hazards and promoting highway safety. See Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5 (1932) (highway authorities proposed putting screen in front of distracting billboard near curve of road; injunction denied). See generally Annot., Validity and Construction of State or Local Regulation Prohibiting the Erection of Maintenance of Advertising Structures Within a Specified Distance of Street or Highway, 81 A.L.R.3d 564 (1977). Safety considerations may also justify restrictions on signs overhanging public streets or walks. See Annot., Validity and Construction of State or Local Regulation Prohibiting or Regulating Advertising Sign Overhanging Street or Sidewalk, 80 A.L.R.3d 687 (1977). See also Pittsford Plaza Assoc. v. Spiegel, 66 N.Y.2d 717, 496 N.Y.S.2d 992, 487 N.E.2d 902 (1985) (town board had authority to reject proposal for 7-screen movie theater on basis, among others, that the proposed use would create traffic problems).

In Mobil Oil Co. v. Township of Westtown, 21 Pa.Cmwlth. 295, 345 A.2d 313 (1975), a zoning ordinance requiring spacing of gasoline stations along highways in order to reduce traffic accidents was upheld. Various safety considerations have been cited in a number of other cases sustaining spacing requirements as to gasoline

reasons for two common types of specialized zoning: Flood-plain zoning is designed to prevent building of residences and other structures in areas subject to periodic or seasonal flooding, and this is upheld where reasonably necessary to protect the health or safety of those who would use the buildings.[98] "Airport zoning" can validly limit the uses and heights of structures near airports and/or within the approach pattern to such facilities.[99]

Restrictions on use of properties near the shore of lakes and streams ("shore-lands zoning") can be sustained if reasonably necessary to preservation of the natural environment.[100] Similarly, "greenbelt zoning" has been used to preserve woodlands and

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stations. Stone v. City of Maitland, 446 F.2d 83 (5th Cir.1971) (requirement that there be at least 350 feet between proposed filling station and any existing station, and between proposed station and any existing church, hospital, school, etc.); City of Boca Raton v. Tradewind Hills, Inc., 216 So.2d 460 (Fla.App.1968) (minimum distance of 750 feet between filling stations); Harvard Enterprises v. Board of Adjustment, 56 N.J. 362, 266 A.2d 588 (1970). Cf. Rasmussen v. Village of Bensenville, 56 Ill.App.2d 119, 205 N.E.2d 631 (1965) (upholding ban on storage of flammable liquids within 200 feet of schools, hospitals, churches, and theatres). But see Buck v. Kilgore, 298 A.2d 107 (Me.1972) (ordinance banning gasoline stations within 2000 feet of schools, churches, etc. held unreasonable). See generally Mosher, Proximity Regulations of the Modern Service Station, 17 Syracuse L.Rev. 1 (1965).

[98] See Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972), cert. denied 409 U.S. 1108, 93 S.Ct. 908, 34 L.Ed.2d 689 (1973). Cf. Cappture Realty Corp. v. Board of Adjustment, 133 N.J.Super. 216, 336 A.2d 30 (1975) (moratorium on construction in flood plain for specified period; upheld). But a number of specific regulations have been found unreasonable as applied to the particular property, or otherwise so extreme as to be "takings." See Dooley v. Town Plan and Zoning Commission of Town of Fairfield, 151 Conn. 304, 197 A.2d 770 (1964); State v. Johnson, 265 A.2d 711 (Me.1970); MacGibbon v. Board of Appeals, 356 Mass. 635, 255 N.E.2d 347 (1970). See generally Dunham, Flood Control via the Police Power, 107 U.Pa.L.Rev. 1098 (1959); Annot., Local Use Zoning of Wetlands or Flood Plain as Taking Without Compensation, 19 A.L.R.4th 756 (1983) (such zoning generally held not to constitute a "taking without compensation").

[99] See Baggett v. City of Montgomery, 276 Ala. 166, 160 So.2d 6 (1963); Waring v. Peterson, 137 So.2d 268 (Fla.App.1962); Village of Willoughby Hills v. Corrigan, 29 Ohio St.2d 39, 278 N.E.2d 658 (1972), cert. denied 409 U.S. 919, 93 S.Ct. 218, 34 L.Ed.2d 181. In Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority, 111 So.2d 439 (Fla.1959), the adoption in an airport zoning ordinance of the airport-approach standards of the Civil Aeronautics Administration was held reasonable. But rules differing from the federal standards may also be valid, if there is no actual conflict and no federal pre-emption as to the particular matter. See LaSalle National Bank v. County of Cook, 34 Ill.App.3d 264, 340 N.E.2d 79 (1975).

Again, a number of cases have found a "taking," at least of an easement, under the particular circumstances. See Peacock v. County of Sacramento, 271 Cal.App.2d 845, 77 Cal.Rptr. 391 (Dist.Ct.1969); Roark v. Caldwell, 87 Idaho 557, 394 P.2d 641 (1964); Indiana Toll Road Commission v. Jankovich, 244 Ind. 574, 193 N.E.2d 237 (1963) cert. dism'd 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed.2d 439; Jackson Municipal Airport Authority v. Evans, 191 So.2d 126 (Miss.1966); Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945). Cf. Hageman v. Wayne Township, 20 Ohio App.2d 12, 251 N.E.2d 507 (1969) (if regulation amounts to taking, court can issue injunction against the regulation or direct the institution of eminent domain proceedings). See generally Annot., Zoning Regulations Limiting Use of Property Near Airport as Taking of Property, 18 A.L.R.4th 542 (1982), containing citations to a number of cases in which "airport zoning" has been found to result in a taking for which compensation is required. See also Kamprath, A Legal and Practical Overview of How Local Governments Can Help Protect the Safety of Manned Flight in the Vicinity of Airports, 49 Urban Law. 563 (2017), saying this is not an area of total federal pre-emption and thus there is still room for state and local regulation; *id.* at 565. As to drones, see Kellington, Drones, 49 Urban Law. 667 (2017); Rule, Drone Zoning, 95 N.C. L. Rev. 133 (2016).

[100] See Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972), where it is noted that the county has power to zone shorelands in Wisconsin, and if the county does not enact an ordinance complying with state standards, the state may enact an ordinance applicable to that county. In some jurisdictions, the state may have *preempted* the field of shorelands zoning. See Lauricella v. Planning and Zoning Board of Appeals, 32 Conn.Sup. 104, 342 A.2d 374 (Com.Pl.1975) (state has pre-empted authority over tidal wetlands). Again, a taking requiring compensation will be found if the zoning restriction leaves the wetlands or shorelands property with no reasonable use—or by some authority may be found if the owner is deprived of a substantial part of the economic use or value. See Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed.Cir.1994), cert. denied 513 U.S. 1109, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995), noted 2 George Mason U.L. Rev. 245 (1995); 14 Temple Envtl. L. & Tech. J. 55 (1995).

open areas around some cities, and also to create a "buffer" between residences and other uses.[101] Originally the Supreme Court, in the *Agins* case, applied a two-prong test to determine whether a taking had occurred when a city zoned land as open space: In order to avoid "taking" liability, the government's action must substantially advance legitimate state interests *and* must not deny the landowner all economically viable use of the property.[102] In the *Lingle* case in 2005,[103] the *Agins* case was partially overruled by the Court's elimination of the first prong of the test for determining whether the land-use measure was a proper and noncompensable exercise of the police power or was a regulatory taking: whether the measure in question substantially advanced legitimate governmental interests. At issue in *Lingle* was a rent-control ordinance. Because the party arguing that a taking of its property had occurred (Chevron) had relied on the "substantially advances" language of *Agins*, it was not entitled to summary judgment on its claim.[104]

On the interpretation of shorelands legislation, see Clam Shacks of America, Inc. v. Skagit County, 109 Wash.2d 91, 743 P.2d 265 (1987) (state statute was to be liberally construed so as to regulate uses as well as development; as thus construed, statute, and county shoreline master program enacted thereunder, applied to clam-harvesting operation). On zoning along ocean coasts, see Berke, San Francisco Bay: A Successful Case of Coastal Zone Planning Legislation and Implementation, 15 Urban Law. 487 (1983). On the Coastal Zone Management Act of 1972, 16 U.S.C.A. 1451–54, providing federal funds for states to develop coastal management programs, see Mandeleker & Sherry, The National Coastal Zone Management Act of 1972, 7 Urban L. Ann. 120 (1974). See generally California v. Watt, 683 F.2d 1253 (9th Cir.1982) (major purpose of Coastal Zone Management Act is to avoid conflict and encourage cooperation between federal and state governments in developing a comprehensive plan for long-term management of resources in coastal zone), rev'd on other grounds 464 U.S. 312, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984) (Department of Interior's sale of oil and gas leases on outer continental shelf doesn't directly affect coastal zone so as to require a consistency determination under Coastal Zone Management Act); Malone, The Coastal Zone Management Act and the Takings Clause in the 1990's: Making the Case for Federal Land Use to Preserve Coastal Areas, 62 U. Colo. L. Rev. 711 (1991); Rychlak, Coastal Zone Management and the Search for Integration, 40 DePaul L. Rev. 981 (1991). On the lack of enforcement of many provisions of the National Coastal Zone Management Act, see Archer & Knecht, The U.S. National Coastal Zone Management Program—Problems and Opportunities in the Next Phase, 15 Coastal Mgt. 103 (1987). See also Salvesen, Wetlands: Mitigating and Regulating Development Impacts (Urban Land Institute 1990); McKinstry, Constraints Upon Development in Environmentally Sensitive Areas: Regulation of Wetlands, Streams, and Floodplains in Pennsylvania, 2 Villanova Envtl. L.J. 333 (1991).

For a summary of legislative and U.S. Supreme Court authority on wetlands regulation, see Minan, Wetlands Regulation and the United States Supreme Court, 38 Urban Law. 523 (2006). See generally Comment, A Historical Perspective on the Recent Decline in "Judicial Pioneering" in Wetlands Regulation, 33 Wm. Mitchell L. Rev. 1225 (2007), noting Rapanos v. United States, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right are covered by federal Clean Water Act). See also, on the possible use of local laws to provide habitat protection, Colburn, Localism's Ecology: Protecting and Restoring Habitat in the Suburban Nation, 33 Ecology L.Q. 945 (2006). As to creating and/or protecting a healthy environment via land-use law, see generally Mudd, A "Constant and Difficult Task": Making Local Land Use Decisions in States With a Constitutional Right to a Healthful Environment, 38 Ecology L. Q. 1 (2011).

[101] See Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (city's open-space zoning upheld; compensation not required); State v. Gallop Building, 103 N.J.Super. 367, 247 A.2d 350 (1968). See generally Humbach, Land and a New Land Ethic, 74 Minn. L. Rev. 339 (1989). As to the validity of zoning that restricts development of "substandard" lots—*i.e.*, lots not meeting minimum area requirements—, see Tekoa Constr., Inc. v. City of Seattle, 56 Wash.App. 28, 781 P.2d 1324 (1989), review denied 114 Wash.2d 1005, 788 P.2d 1079 (1990) (upholding ordinance restricting development of such lots in common ownership). On planning of green belts and open areas, see also Sections 21.1 and 21.5 *infra*.

[102] Agins v. City of Tiburon, *supra* note 101. For a critique of this test, see Sullivan, Emperors and Clothes: The Genealogy and Operation of the *Agins* Tests, 33 Urban Law. 343 (2001). See also, criticizing Supreme Court cases partially based on *Agins*, Sullivan, Return of the Platonic Guardians: *Nollan* and *Dolan* and the First Prong of *Agins*, 34 Urban Law. 39 (2002).

[103] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

[104] See Jacobs, Indigestion for Eating Crow: The Impact of *Lingle v. Chevron, U.S.A., Inc.*, on the Future of Regulatory Takings Doctrine, 38 Urban Law. 451 (2006) ("very little upheaval in case law is seen

Some states have enacted land-use laws designating certain areas as "agricultural lands" and providing for their conservation.[105] Preserving and protecting the

within federal and state jurisprudence"; *id.* at 479); Radford, Just a Flesh Wound? The Impact of *Lingle v. Chevron* on Regulatory Takings Law, 38 Urban Law. 437 (2006) ("the same facts that previously led to takings liability under the substantial advancement test will simply be pled under a different legal theory in the future, arriving at the same result that would have pertained pre-*Lingle*"; *id.* at 438). As to rent control, see generally Section 23.2, notes 13–14, *infra*, and accompanying text. See also Baron, Winding Toward the Heart of the Takings Muddle: *Kelo, Lingle*, and Public Discourse About Private Property, 34 Fordham Urban L.J. 613 (2007); Curtin, Gowder & Wenter, Exactions Update: The State of Development Exactions After *Lingle v. Chevron U.S.A., Inc.*, 38 Urban Law. 641 (2006), concluding "As land use exactions continue to be employed by local governments as a means to require that new development pay its own way, *Nollan* and *Dolan*'s 'nexus' and 'rough proportionality' rules will continue to be applied and shaped through litigation in state courts." *Id.* at 655.

Excellent analysis of the *Lingle* case and its effect on earlier cases is found in several articles in a Real Estate Symposium in John Marshall Law Review: Callies & Goodin, The Status of *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* After *Lingle v. Chevron U.S.A., Inc.*, 40 John Marshall L. Rev. 539 (2007); Epstein, From *Penn Central* to *Lingle*: The Long Backwards Road, *id.* at 593; and Whitman, Deconstructing *Lingle*: Implications for Takings Doctrine, *id.* at 573.

On possible relinquishment of the right to attach open-space and related requirements to permits for subdivisions, see Wilson v. Board of County Comm'rs of Teton County, 153 P.3d 917 (Wyo. 2007) (developers relinquished their right to contest validity and constitutionality of conditions imposed on their subdivision, requiring them to set aside portions of the subdivision as mandatory open space and for affordable housing, when they did not challenge the conditions until after subdivision had been approved and all but four lots in the subdivision had been sold, gifted, or reserved for their business).

[105] See Lewis County v. Western Wash. Growth Management Hearings Bd., 157 Wash.2d 488, 139 P.3d 1096 (2006), applying the Washington State statute and defining "agricultural land" under the Act as land that is not already characterized by urban growth and that is primarily devoted to the commercial production of agricultural products, including land in areas used or capable of being used for production based on land characteristics. The court said that land should be designated as "agricultural" based not only on soil and land characteristics but also on farm industry's projected needs. The county's exclusion of "farm centers" and farm homes for agricultural-land designation was held erroneous, as was the allowing of residential subdivisions and other non-farm uses within the designated areas. Compare Seward County v. Navarro, 35 Kan.App.2d 744, 133 P.3d 1283 (2006) (training of horses for racing purposes was not agricultural use). Cf. Wetherell v. Douglas County, 342 Or. 666, 160 P.3d 614 (2007) (in determining whether land is suitable for farm use, local government may not be precluded from considering the costs or expenses of engaging in those activities). See generally Chumbler, Negro & Bechler (eds.), Urban Agriculture—Policy, Law, Strategy and Implementation (ABA Section of State and Local Government Law 2015); Heckler, A Right to Farm in the City: Providing a Legal Framework for Legitimizing Urban Farming in American Cities, 47 Valparaiso U. L. Rev. 217 (2012); Witt, Urban Agriculture and Local Government Law: Promises, Realities, and Solutions, 16 U. Pa. J. L. & Soc. Change 221 (2013); Note, The Intersection Between Urban Agriculture and Form-Based Zoning: A Return to Traditional Planning Techniques, 19 Hastings W.-N.W. J. Envtl. L. & Pol'y 83 (2013); Note, Putting Paradise in the Parking Lot: Using Zoning to Promote Urban Agriculture, 88 Notre Dame L. Rev. 2551 (2013). Much writing on urban agriculture has focused on experiments and experiences in particular localities: *Baltimore*: Note, Farming the Slums: Using Eminent Domain and Urban Agriculture to Rebuild Baltimore's Blighted Neighborhoods, 38 Wm. & Mary Envtl. L. & Pol'y Rev. 479 (2014); *Detroit*: Note, Securing the Momentum: Could a Homestead Act Help Sustain Detroit Urban Agriculture?, 16 Drake J. Agri. L. 241 (2011); Note, Growing in the D: Revising Current Laws to Promote a Model of Sustainable City Agriculture, 89 U. Detroit Mercy L. Rev. 181 (2012); *Florida*: Cossey & student, Protecting Equine Rescue From Being Put Out to Pasture: Whether Ranches Dedicated to Abused, Abandoned, and Aging Horses May Qualify for "Agricultural" Classifications Under Florida's Greenbelt Law, 16 Drake J. Agri. L. 69 (2011); *Trenton and Newark, New Jersey*: Note, Encouraging the Growth of Urban Agriculture in Trenton and Newark Through Amendments to the Zoning Codes: A Proven Approach to Addressing the Persistence of Food Deserts, 14 Vt. J. Envtl. L. 71 (2012); *Ohio*: Comment, Seeds of Change: Growing a Solution to Blight in Ohio's Legacy Communities Through Urban Agriculture, 47 U. Toledo L. Rev. 553 (2016). See also, as to *Hawaii*, Comment, Avoiding the Next Hakulia: The Debate Over Hawaii's Agricultural Subdivisions, 27 U. Hawaii L. Rev. 441 (2005).

Urban agriculture has become a topic of much comment and development within the law. See Note, The Latest Trends in Urban Agriculture, 19 Drake J. Agri. L. 327 (2014); Note, Perennial Cities: Applying Principles of Adaptive Law to Create a Sustainable and Resilient System of Urban Agriculture, 53 U. Louisville L. Rev. 301 (2015). See generally Symposium, Cultivating New Urban Communities: Urban Agriculture and Community Gardens, 43 Fordham Urban L. J. 195–421 (2016).

Urban agriculture has been suggested as a way of preserving farming from the encroachments of cities and towns. See Note, Too Close for Comfort: Protecting Agriculture in an Urban Age, 81 Mo. L. Rev. 853 (2016).

environment is increasingly recognized as a valid purpose in land-use law, as is dealing with and containing air pollution.[106] Though in general the regulation of economic

Indoor and vertical farming can be used to expand farming beyond the limited confines of urban ground. See Frazier, High-Rise Greens, The New Yorker, Jan. 9, 2017, at 52. Cf. Central Oregon Landwatch v. Deschutes County, 276 Or. App 282, 367 P. 3d 560 (2016) (statute zoned land exclusively for farm use, but conditional use permit could be granted for some other uses; landowners, however, wanted to use land as a commercial event avenue, so permit was rightly denied). Urban agriculture might even play a part in alleviating rural poverty. See generally Rinehart, Zoned for Injustice: Moving Beyond Zoning and Market-Based Land Preservation to Address Rural Poverty, 23 Geo. J. on Poverty L. & Pol'y 61 (2015). See also Symposium, Plowing New Ground: The Intersection of Technology and Agricultural Law, 39 U. Ark. Little Rock L. Rev. 351–488 (2017). As to activities of the "urban agriculture movement," see Bouvier, How Cities Are Responding to the Urban Agriculture Movement With Micro-Livestock Ordinances, 47 Urban Law. 85 (2015).

As to what is "agricultural land," see City of Arlington v. Central Puget Sound Growth Management Hearings Bd., 164 Wash. 2d 768, 193 P.3d 1077 (2008) ("agricultural land" is, among other characteristics, land that has long-term commercial significance for agricultural production). See generally La Croix, Urban Agriculture and Other Green Uses: Remaking the Shrinking City, 42 Urban Law. 225 (2010). Some have urged caution in the creation of agricultural zones. See Note, The Rise of Urban Agriculture: A Cautionary Tale—No Rules, Big Problems, 4 Wm. & Mary Bus. L. Rev. 241 (2013). Cf. Note, Applying Sustainable Land Use Development Studies to Sustainable Agriculture: Are the Conditions Ripe for a Successful Movement Toward Sustainable Agriculture?,78 Brooklyn L. Rev. 1033 (2013). See generally Symposium, Safety and Sustainability in the Era of Food Systems: Reaching a More Integrated Approach, 2014 Wis. L. Rev. 199–469, particularly Schindler, Unpermitted Urban Agriculture: Transgressive Actions, Changing Norms, and the Local Food Movement, *id.* at 369. One activity that may be affected by urban agriculture is the keeping of bees. See Peters, Keeping Bees in the City? Disappearing Bees and the Explosion of Urban Agriculture Inspire Urbanites to Keep Honeybees, 17 Drake J. Agri. L. 597 (2012). See generally Negro and Terranova, The Birds and the Bees: Recent Development in Urban Agriculture, 47 Urban Law. 445 (2015). Some commentators see urban agriculture as a way of helping revive cities. See Comment, Bringing Food Back Home: Revitalizing the Postindustrial City Through State and Local Policies Promoting Urban Agriculture, 92 Or. L. Rev. 783 (2014). As to environmental issues presented by urban agriculture, see La Croix, Urban Agriculture and the Environment, 46 Urban Law. 227 (2014). The history of urban agriculture in the United States from the 19th century to the present is well summarized in Pollans & Roberts, Setting the Table for Urban Agriculture, 46 Urban Law. 199 (2014).

[106] See generally Comment, Recreating the Western City in a Post-Industrialized World: European Brownfield Policy and an American Comparison, 53 Buffalo L. Rev. 1273 (2005). "Brownfields," as discussed in the above-cited comment, are real estate on which there is contamination by hazardous materials, or at least the perception of possible contamination. *Id.* at 1274. Such areas have been a major problem in the development of many urban areas in the United States. See Appex, The Brownfield Manifesto, 37 Urban Law. 163 (2005); Eison, Brownfields at 20: A Critical Reevaluation, 34 Fordham Urban L.J. 721 (2007). See also Comment, Fighting Uncertainty: Municipal Partnerships With Redevelopment Agencies Can Mitigate Uncertainty to Encourage Brownfield Redevelopment, 1 Golden Gate Envtl. L.J. 267 (2007). Among the suggested remedies for brownfields is using them to promote urban agriculture. See Note, Utilizing Michigan Brownfield Policies to Incentivize Community-Based Urban Agriculture in Detroit, 3 Mich. J. Envtl. & Admin. L. 421 (2014). Or using them as part of mixed use projects. See Laitos & student, The Role of Brownfields as Sites for Mixed Use Development Projects in America and Britain, 40 Denver J. Int'l L. & Pol'y 492 (2011–12). Or using them as energy havens. See Scholtes, From Trash to Treasure: Converting America's Contaminated Land Into Renewable Energy Havens, 47 Suffolk U. L. Rev. 1 (2014). See generally American Bar Ass'n Section of Environment, Energy & Resources, Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property (3d ed. 2013); Edwards (ed.), Implementing Institutional Controls at Brownfields and Other Contaminated Sites (2d ed. ABA Books 2012). As to legislation in this area, see Weissman and Sowinski, Revitalizing the Brownfields Revitalization and Environmental Restoration Act: Harmonizing the Liability Defense Language to Achieve Brownfield Restoration, 33 Va. Envtl. L.J. 257 (2015). See also Wilson, It's Not "Just" Zoning: Environmental Justice and Land Use, 49 Urban Law. 717 (2017), dealing with choosing sites for locally unwanted land uses.

It has been suggested that climate change may make necessary some changes in local zoning laws, perhaps making desirable a revamping of our entire zoning system since federal involvement may now be needed in that system, though historically the federal government has not participated there. Flatt, Adapting Laws for a Changing World: A Systemic Approach to Climate Change Adaptation, 64 U. Fla. L. Rev. 269, 292 (2012). See Heinzerling, Climate, Preemption, and the Executive Branches, 50 Ariz. L. Rev. 925 (2008), and Stewart, States and Cities as Actors in Global Climate Regulation, 50 Ariz. L. Rev. 681 (2008), both parts of Symposium, Federalism and Climate Change: The Role of the States in a Future Federal Regime, 50 Ariz. L. Rev. 673–938 (2008). See generally Sussman, Climate Change Adaptation: Fostering Progress Through Law and Regulation, 18 N.Y.U. Envtl. L. Rev. 55 (2010); Trisolini, What Local Climate Change Plans Can Teach Us About City Power, 36 Fordham Urb. L. J. 863 (2009); Trisolini, All Hands on Deck: Local Governments and

the Potential for Bidirectional Climate Change Regulation, 62 Stan. L. Rev. 669 (2010); Colloquium, Cities and Climate Change, 36 Fordham Urb. L. J. 159 (2009).

Dealing with climate change has been suggested as coming within the police power and thus being an appropriate purpose for zoning. See Dellinger, Localizing Climate Change Action, 14 Minn. J. L., Science & Technology 603 (2013); Nolon, Land Use and Climate Change: Lawyers Negotiating Above Regulation, 78 Brooklyn L. Rev. 521 (2013); Osofsky, Suburban Climate Change Efforts: Possibilities for Small and Nimble Cities Participating in State, Regional, National, and International Networks, 22 Cornell J. L. & Pub. Pol'y 395 (2012); Comment, Quantifying an Uncertain Future: The Demands of the California Environmental Quality Act and the Challenge of Climate Change Analysis, 43 McGeorge L. Rev. 1065 (2012). Cf. Craig, Ocean Governance for the 21st Century: Making Marine Zoning Climate Change Adaptable, 36 Harv. Envtl. L. Rev. 305 (2012); Negro, Recent Development in Coastal Adaptation to Climate Change, 45 Urban Law. 991 (2013). See also Burkett, Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change, 20 George Mason L. Rev. 775 (2013); Raskin, Urban Forests as Weapons Against Climate Change: Lessons from California's Global Warming Solutions Act, 47 Urban Law. 387 (2015); Symposium, Climate Change Justice, 13 Chicago J. Int'l L. 345–614 (2013). Other symposiums and articles that emphasize municipal action in this area include Symposium, Global Challenges and Local Solutions: The Role of Municipalities in the Fight Against Climate Change, 28 Fordham Envtl. L. Rev. 1–135 (2016); Symposium, Continuing to Fight Today's Environmental Challenges: Climate Change, Health Concerns, Energy, and Food Supply, 51 Valparaiso U.L. Rev. 339–557 (2017). Cf. Byrne and Zyla (with responses), Climate Exactions, 47 Envtl. L. Rep. News & Analysis 10666–10680 (2017); Dana, Incentivizing Municipalities to Adapt to Climate Change: Takings Liability and FEMA Reform as Possible Solutions, 43 Bost. College Envtl. Aff. L. Rev. 281 (2016).

One of the widely discussed topics in the climate-change area is the rising of sea levels. See Note, The Intersection of the Takings Clause and Rising Sea Levels: Justice O'Connor's Concurrence in *Palazzolo* Could Prevent Climate Change Chaos, 43 Bost. College Envtl. Aff. L. Rev. 511 (2016); Comment, A Taxing Endeavor: Local Government Protection of Our Nation's Coasts in the "Wake" of Climate Change, 31 J. Land Use & Envtl. L. (2015). Another disaster attributed at times to climate change is wildfires. See Comment, Municipal Wildfire Management in California: A Local Response to Global Climate Change, 32 Pace Envtl. L. Rev. 600 (2015).

States as well as municipalities are responding to climate change. See Note, State-level Regulation as the Ideal Foundation for Action on Climate Change: A Localized Beginning to the Solution of a Global Problem, 101 Cornell L. Rev. 1627 (2016). Cf. Beamish, Grattet, and Niemeier, Climate Change and Legitimate Governance: Land Use and Transportation Law and Policy in California, 82 Brook. L. Rev. 725 (2017); Comment, How to Avoid Constitutional Challenges to State-Based Climate Change Initiatives: A Case Study of *Rocky Mountain Farmers Union v. Corey* and New York State Programs, 32 Pace Envtl. L. Rev. 564 (2015).

As to specific *cities* that have fought climate change, see Vaida, The New York City Carbon Charge ("NY3C"): Unlocking Localities Power to Fight Climate Change, 27 Fordham Envtl. L. Rev. 277 (2016); Williams, Green and Kim, Municipal Leadership of Climate Adaptations Negotiations: Effective Tools and Strategies in Houston and Fort Lauderdale, 33 Negotiation J. 5 (2017).

It has also been recognized that the police power covers regulation of hydraulic fracturing by the oil and gas industry and thus may be subject to regulation by local governments *if* the state has not pre-empted the field. See Knight and Gullman, The Power of State Interest: Preemption of Local Fracking Ordinances in Home-Rule Cities, 28 Tulane Envtl. L.J. 297 (2015); Ritchie, Fracking in Louisiana: The Missed Process/Land Use Distinction in State Preemption and Opportunities for Local Participation, 76 La. L. Rev. 809 (2016); Note, Moving Past Preemption: Enhancing the Power of Local Governments Over Hydraulic Fracturing, 98 Minn. L. Rev. 385 (2013); Note, Preemption and Home-Rule: The Power of Local Governments to Ban or Burden Hydraulic Fracturing, 11 Tex. J. Oil, Gas & Energy L. 415 (2016); Comment, Regulating Hydraulic Fracturing Through Land Use: State Preemption Prevails, 85 U. Colo. L.Rev. 817 (2014). Cf. Turrell, Frack Off! Is Municipal Zoning a Significant Threat to Hydraulic Fracturing in Michigan, 58 Wayne L. Rev. 279 (2012); Recent Development Note, Fighting Fracking: Unexplored Territory in State and Parish Policy, 91 Tulane L. Rev. 801 (2017). See generally Symposium, Legal Aspects of Hydraulic Fracturing, 49 Idaho L. Rev. 241–517 (2013). On the situation in New York State, see Note, Zoning Out Fracking: Zoning Authority Under New York State's Oil, Gas, and Solution Mining Law, 40 Fordham Urban L. J. 869 (2012); Note, Drawing Lines in the Shale: Local Zoning Bans, the Taking Clause, and the Clash to Come If New York State Promulgates Hydrofracking Regulations, 64 Syracuse L. Rev. 489 (2014); Symposium, Fractured Communities: Hydraulic Fracturing and the Law in New York State, 77 Albany L. Rev. 643 (2013–14). Cf. Jordan, Local Land-Use Control, Constitutional Environmentalism, and Hydrofracking: New York and Beyond, 28 Tulane Envtl. L. J. 315 (2015).

On joint efforts by states and localities to deal with hydrofracking, see Comment, Are the West's Water Resources Fracked? A Study on the Effects of Fracking and How States and Localities Are Responding, 46 Envtl. L. 257 (2016); Note, Governing Hydraulic Fracturing Through State-Local Dynamic Federalism: Lessons From a Florida Case Study, 42 Fla. St. U.L. Rev. 867 (2015); Comment, Fracking in Illinois: Implementation of the Hydraulic Fracturing Regulatory Act and Local Government Regulatory Authority, 35 N. Ill. U. L. Rev. 575 (2015). As to federal regulation, see Comment, Conflicting Theories at Play: Chemical

competition is *not* a legitimate purpose of zoning, such regulation may be permissible if it promotes other police-power purposes, including the protection of a downtown business district.[107]

§ 18.5 Zoning—Nonconforming Uses

One limitation commonly found on the effect of zoning ordinances is that they don't apply to nonconforming uses. Such a use has been defined as one lawfully in existence at the time the zoning ordinance took effect and continuing to exist since that time.[108] The exception for such uses developed early in the history of American zoning[109] because (1) zoning was considered mainly a matter of prospective control, not a tool to change existing development; (2) "Euclidean" zoners felt that a few nonconforming uses wouldn't harm the overall plan—especially since early zoning was nearly always cumulative, not

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Disclosure and Trade Secrets in the New Federal Regulations, 9 Golden State U. Envtl. L. J. 217 (2016). Cf. Mills, What Should Tribes Expect From Federal Regulations? The Bureau of Land Management's Fracking Rule and the Problems with Treating Indian and Federal Lands Identically, 37 Pub. Land & Resources L. Rev. 1 (2016). As to whether hydrofracking is most appropriately regulated at the federal, state, or local level—or some combination of these—, compare Freilich & Popowitz, Oil and Gas Fracking: State and Federal Regulation Does Not Preempt Needed Local Government Regulation, 44 Urban Law. 533 (2012), with Burford, The Need for Federal Regulation of Hydraulic Fracturing, 44 Urban Law. 577 (2012). See generally Nolon & Polidoro, Hydrofracking: Disturbances Both Geological and Political: Who Decides?, 44 Urban Law. 507 (2012). See also Burger, The (Re)federalization of Fracking Regulation, 2013 Mich. St. L. Rev. 1484; Wegemer, Drilling Down: New York Hydraulic Fracturing, and the Dormant Commerce Clause, 28 B.Y.U. J. Pub. L. 351 (2014). As to total bans on hydraulic fracturing, see Sparks and Morain, Usurping Democracy and the Attempts to Ban Hydraulic Fracturing, 5 LSU J. Energy L. & Resources 313 (2017). As to treating hydraulic fracturing as involving possible inverse condemnation, see Note, Inverse Condemnation and Fracking Disasters: Government Liability for the Environmental Consequences of Hydraulic Fracturing Under a Constitutional Takings Theory, 44 Bost. College Envtl. Affairs L. Rev. 55 (2017). As to inverse condemnation, see Section 19.2.

[107] See Hernandez v. City of Hanford, 41 Cal.4th 279, 59 Cal.Rptr.3d 442, 159 P.3d 33 (2007) (zoning ordinance restricting furniture sales was drafted so as to protect city's unique downtown commercial district, which was known for its furniture retailers; upheld). See also, on restrictions on "big box" stores, Lefcoe, The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-mart and the United Food and Commercial Workers Union, 58 Ark. L. Rev. 833 (2006); Comment, Community Rights: Fighting the Walmart Invasion of Small Town America With Legal Intelligence, 17 Scholar 407 (2015). As to the validity and effect of zoning to protect small local businesses, as opposed to large chain and discount stores, see Botwinick, Effron & Huang, Saving Mom and Pop: Zoning and Legislating for Small and Local Business Retention, 18 J. L. & Pol'y 607 (2010). See also, as to efforts to limit "formula" businesses, such as franchise outlets, through zoning laws, Bobrowski, The Regulation of Formula Businesses and the Dormant Commerce Clause Doctrine, 44 Urban Law. 227 (2012).

[108] Arsenault v. City of Keene, 104 N.H. 356, 187 A.2d 60 (1962); Town of Highland Park v. Marshall, 235 S.W.2d 658 (Tex.Civ.App. 1950), ref'd n.r.e.; Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wash.2d 1, 959 P.2d 1024 (1998). See Annot., Classification and Maintenance of Advertising Structures as Nonconforming Use, 80 A.L.R.3d 630 (1977). See generally 82 Am. Jur.2d Zoning and Planning § 178 (1976). A change in ownership of the nonconforming use does not necessarily terminate the right to the use, but a zoning ordinance *may* validly provide for such termination upon change in ownership. See Annot., Zoning: Change in Ownership of Nonconforming Business or Use as Affecting Right to Continuance Thereof, 9 A.L.R.2d 1039 (1950). Cf. Iazzetti v. Village of Tuxedo Park, 145 Misc.2d 78, 546 N.Y.S.2d 295 (1989) (landowner had non-conforming business use of property and subsequently transferred the business, but not the land, to son and grandson; held that this did not constitute a change in use so as to permit termination). See generally Serkin, Existing Uses and the Limits of Land Use Regulations, 84 N.Y.U. L. Rev. 1222 (2009).

[109] See Juergensmeyer & Roberts, Land Use Planning & Control Law 149 & n. 3 (1998), noting that some early cases sustained retroactive applications of zoning-like restrictions—but doubt remained as to the validity of retroactive effect, since those cases involved nuisances or near-nuisances. (Citing Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (brickyard); Reinman v. City of Little Rock, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900 (1915) (stables).) On the history of nonconforming uses, see generally Krause, Nonconforming Uses in Illinois, 43 Chi.-Kent L.Rev. 153 (1966); Strong, Nonconforming Uses: The Black Sheep of Zoning, 7 Institute on Planning & Zoning 25 (1968). Non-conforming uses are sometimes referred to as "grandfather" uses or rights. See Lawrence v. City of Rawlins, 224 P.3d 862, 865 note 1 (Wyo. 2010), citing Snake River Brewing Co. v. Town of Jackson, 39 P.3d 397 (Wyo. 2002).

exclusive (*i.e.*, so-called "higher uses" were allowed in "lower-use zones"); (3) political opposition to zoning in the early years was strong enough that zoning laws often could not be passed unless exception was made for existing land uses; and (4) the constitutionality of zoning laws was in doubt for some time, and if nonconforming uses are not allowed, the arguments against this use of the police power are greatly strengthened.[110] Most zoning ordinances specifically provide for nonconforming uses,[111] but occasionally an exception for such uses is "read in" where the language of an ordinance is unclear, or even seems not to allow these uses.[112]

As to the initial existence of a nonconforming use, there are two main requirements: the use must be *actual* and *lawful* at the time the zoning control goes into effect. Thus, it has been held that the nonconforming utilization of the premises must be actually in operation at the time of the new zoning law; it is not enough that the property had been purchased when it was free of such restrictions and/or that the nonconforming use had been contemplated at the time of purchase and/or that plans had actually been drawn up for such a use.[113] And the use must, when the zoning ordinance takes effect, be in violation of no other laws; it must, aside from the new zoning restriction, be a "lawful use" of the premises.[114] This is sometimes, though not always, said to require that the

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[110] See Robert D. Ferris Trust v. Planning Comm'n of Kauai County, 138 Hawaii; 307, 378 P. 3d 1023 (App. 2016) (statutory protection of nonconforming uses is grounded in constitutional law). Cf. Johnson v. City of Seattle, 335 P.3d 1027 (Wash. 2014) (city ordinance preventing a landowner from presenting evidence of his legal nonconforming use as a defense to a citation violation violates Due Process clause). Occasionally, zoning ordinances that don't permit nonconforming uses have been declared unconstitutional. See Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930). Or outside the scope of the power granted by state statutes. Bane v. Township of Pontiac, 343 Mich. 481, 72 N.W.2d 134 (1955). But the trend is toward upholding ordinances that eliminate such uses, at least if a sufficient period of "amortization" is allowed before termination must occur. See note 128 *infra* and accompanying text.

[111] See Edmonds v. City of Los Angeles, 40 Cal.2d 642, 255 P.2d 772 (1953) (provision exempting nonconforming uses is usually included in zoning ordinances because otherwise there is hardship, and doubt about the ordinance's constitutionality); State ex rel. Covenant Harbor Bible Camp v. Steinke, 7 Wis.2d 275, 96 N.W.2d 356 (1959).

[112] See Amereihn v. Kotras, 194 Md. 591, 71 A.2d 865 (1950) (zoning regulation cannot eliminate pre-existing use since would amount to confiscation of vested right). Cf. Township of Orion v. Weber, 83 Mich.App. 712, 269 N.W.2d 275 (1978), where an attempt to allow nonconforming uses only if they did not significantly interfere with the community's master plan was invalidated.

[113] See Sherman-Colonial Realty Corp. v. Goldsmith, 155 Conn. 175, 230 A.2d 568 (1967); Fairlawns Cemetery Association v. Bethel, 138 Conn. 434, 86 A.2d 74 (1952); Bolduc v. Pinkham, 148 Me. 17, 88 A.2d 817 (1952) (purchaser had bought land in order to build bakery, was unable to do so because of wartime economic conditions and shortages; nonetheless, zoning law passed before he began his use could validly prohibit the bakery); Chayt v. Board of Zoning Appeals, 177 Md. 426, 9 A.2d 747 (1939); Howard Grabhorn and Grabhorn, Inc. v. Washington County, 279 Or. App. 197, 379 P. 3d 796 (2) (2016) (owners failed to establish property's nonconforming use on date zoning regulations went into effect); City of Harrisburg v. Pass, 372 Pa. 318, 93 A.2d 447 (1953); Talbot v. Myrtle Beach, 222 S.C. 165, 72 S.E.2d 66 (1952). Cf. O'Rourke v. Teeters, 63 Cal.App.2d 349, 146 P.2d 983 (Dist.Ct.1944) (large investment in city lot with intent to use for business does not prevent city from subsequently zoning the property for residential use only); Weber v. Pieretti, 72 N.J.Super. 184, 178 A.2d 92 (1962), aff'd 77 N.J.Super. 423, 186 A.2d 702 (nonconforming use could not be enlarged; building permit purporting to allow enlargement was invalid and created no estoppel); Mahler v. City of Seabrook, 538 S.W.2d 870 (Tex.Civ.App. 1976) (city could enforce ordinance against nonconforming use even though it had allegedly permitted such uses on other tracts). If only part of a tract is actually utilized for the nonconforming use, the right to continue the use has been said to extend to the rest of the tract only if there has been an appropriation of the entire area for nonconforming purposes. Conway v. City of Greenville, 254 S.C. 96, 173 S.E.2d 648 (1970). But usually the expansion of nonconforming use is restricted anyway. See note 120 *infra* and accompanying text. On the sufficiency of activity to establish "use," see Fredal v. Forster, 9 Mich.App. 215, 156 N.W.2d 606 (1967) (removal of 50,000 cubic yards of stone was substantial enough to establish a quarry).

[114] See State v. Stonybrook, Inc., 149 Conn. 492, 181 A.2d 601 (1962), appeal dism'd, cert. denied 371 U.S. 185, 83 S.Ct. 265, 9 L.Ed.2d 227 (violation of building code); 12701 Shaker Boulevard Co. v. City of Cleveland, 31 Ohio App.2d 199, 287 N.E.2d 814 (1972); Botchlett v. City of Bethany, 416 P.2d 613 (Okl.1966);

user has even obtained all permits necessary to the conducting of the nonconforming business or other use.[115] Clearly, if the alleged nonconforming use could not have *qualified* to obtain the necessary permit (as opposed to the situation where the permit was obtainable but simply had not been procured), there should be no doubt that the use is not "lawful."[116] What if the real-property owner has obtained all necessary building permits and has begun construction for an intended use, but the zoning law is then changed so that the proposed use is no longer permitted? Neither the application for,[117]

Town of Scituate v. O'Rourke, 103 R.I. 499, 239 A.2d 176 (1968); King County, Dept. of Dev. & Environmental Services v. King County, 305 P.3d 240 (Wash. 2013) (component of establishing a non-conforming use is that the use be lawfully established); David A. Ulrich, Inc. v. Town of Saukville, 7 Wis.2d 173, 96 N.W.2d 612 (1959). Cf. Universal Holding Co. v. Township of North Bergen, 55 N.J.Super. 103, 150 A.2d 44 (1959) (if in violation of zoning laws when use begins, cannot later claim non-conforming use). But it has been held that merely because a property-owner is in violation of a restrictive covenant, his use does not become illegal, since this is a contractual matter between private parties. Gauthier v. Village of Larchmont, 30 App. Div.2d 303, 291 N.Y.S.2d 584 (1968).

[115] See Mang v. County of Santa Barbara, 182 Cal.App.2d 93, 5 Cal.Rptr. 724 (Dist.Ct.1960) (owner was without legal right to obtain permit for gasoline station where zoning prohibiting such use became effective prior to his application for permit); Scavone v. Mayor and Council of Totowa, 49 N.J.Super. 423, 140 A.2d 238 (1958) (owner had valid nonconforming use where had necessary license, though had not obtained certificate of occupancy, which was supposedly also required—law on such certificates not strictly enforced); Smalls v. Board of Standards and Appeals, 28 Misc.2d 147, 211 N.Y.S.2d 212 (1961), aff'd 14 A.D.2d 548, 218 N.Y.S.2d 1005, aff'd 11 N.Y.2d 698, 225 N.Y.S.2d 765, 180 N.E.2d 917 (no certificate of occupancy had been obtained; no right to nonconforming use); Material Service Corp. v. Town of Fitzhugh, 343 P. 3d 624 (Okla. Civ. App. 2014) (limestone crushing company never obtained a permit to mine, as required by law; no right to nonconforming use). Cf. City of Raleigh v. Fisher, 232 N.C. 629, 61 S.E.2d 897 (1950) (business not a valid nonconforming use if carried on under an illegally issued permit). See generally Annot., Rights of Permittee Under Illegally Issued Building Permit, 6 A.L.R.2d 960 (1949).

[116] See Eggert v. Board of Appeals, 29 Ill.2d 591, 195 N.E.2d 164 (1963); Heimerle v. Village of Bronxville, 168 Misc. 783, 5 N.Y.S.2d 1002 (1938), aff'd 256 App.Div. 993, 11 N.Y.S.2d 367 (1939).

[117] National Amusements v. Commissioner of Inspectional Services Dep't, 26 Mass.App.Ct. 80, 523 N.E.2d 789 (1988), review denied 403 Mass. 1101, 526 N.E.2d 1295 (1988) (zoning amendment may supersede and thus frustrate a building permit application). See Annot., Retroactive Effect of Zoning Regulation, in Absence of Saving Clause, on Pending Application for Building Permit, 50 A.L.R.3d 596 (1973) (a newly adopted law will apply to bar issuance of a building permit that was duly applied for prior to adoption of effective date of the law). Cf. City of Aspen v. Marshall, 912 P.2d 56 (Colo.1996) (municipality may properly refuse building permit for land use repugnant to pending zoning ordinance, even though application was made when intended use conformed to existing regulations). But Washington State takes a different view. Snohomish County v. Pollution Control Hearings Bd., 386 P. 3d 1064 (Wash. 2016) (under vested rights doctrine, developers entitled to have land development proposal processed under regulations in effect at the time a completed building permit application is filed); Twin Bridge Marine Park, L.L.C. v. Washington Dep't of Ecology, 162 Wash.2d 825, 175 P.3d 1050 (2008) (doctrine of vested rights entitles developers to have a land development proposal processed under the regulations in effect at time a complete building permit is filed, regardless of subsequent changes in zoning or other land use regulations); Noble Manor Co. v. Pierce County, 133 Wash.2d 269, 943 P.2d 1378 (1997) (filing of complete application for subdivision vested in developer the right to develop property under land use laws in effect on date of application); Erickson & Associates, Inc. v. McLerran, 123 Wash.2d 864, 872 P.2d 1090 (1994) (developer entitled to have proposal processed under regulations in effect at time building permit application is filed, regardless of subsequent changes in regulations); Valley View Industrial Park v. City of Redmond, 107 Wash.2d 621, 733 P.2d 182 (1987) (property owner has vested right to use his property according to applicable zoning ordinances in effect at time he applies for building permit). Accord, Lauer v. Pierce County, 173 Wash. 2d 242, 267 P.3d 988 (2011). For a good discussion of the vested right doctrine, see WCHS, Inc. v. City of Lynnwood, 120 Wash.App. 668, 86 P.3d 1169 (2004). Compare KOB-TV, L.L.C. v. City of Albuquerque, 137 N.M. 388, 111 P.3d 708 (App. 2005) (term "vested right" may be used to describe a non-conforming use, but the vested-rights *doctrine* applies to an ongoing development or project which has been approved and on which substantial investment has been made; regardless of whether property owner's operation of helipad was non-conforming use or vested right, city had right to impair that use by enacting ordinance regulating placement of helicopters within city limits). See generally Calandrillo, Deliganis, and Elles, The Vested Rights Doctrine: How a Shield Against Injustice Became a Sword for Opportunistic Developers, 78 Ohio St. L.J. 443 (2017).

nor the actual obtaining of,[118] the building permit suffices to establish a nonconforming use. But the general rules are bent a little in one situation: If the owner has, in good faith and in reliance on a valid building permit (if such permit is necessary), begun substantial construction on his proposed use, *or* incurred substantial expenses directly related to construction, he will usually be deemed to have a nonconforming use, despite the lack of actual operation.[119]

Expansion of nonconforming uses is generally not allowed,[120] nor are substantial

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If the permit is initially denied, a reviewing court will generally apply the law in effect at the time of its decision, not that in effect when the permit was denied. See Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111 (1973).

Some zoning ordinances contain "saving clauses" that protect the rights of persons who have applied for and/or received building permits prior to an ordinance's taking effect. See Annot., Zoning Provisions Protecting Landowners Who Applied for or Received Building Permit Prior to Change in Zoning, 49 A.L.R.3d 1150 (1973).

[118] See Franchise Realty Interstate Corp. v. City of Detroit, 368 Mich. 276, 118 N.W.2d 258 (1962); County of Saunders v. Moore, 182 Neb. 377, 155 N.W.2d 317 (1967). But see Ben Lomond, Inc. v. City of Idaho Falls, 92 Idaho 595, 448 P.2d 209 (1968) (zoning ordinance adopted after application made for permit to build service station held inapplicable to that application). See generally Annot., Retroactive Effect of Zoning Regulation, in Absence of Saving Clause, on Validly Issued Building Permit, 49 A.L.R.3d 13 (1973).

[119] See Dobbins v. Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169 (1904) (purchase of lands, contract for erection of gasworks, and construction of foundation); Kissinger v. City of Los Angeles, 161 Cal.App.2d 454, 327 P.2d 10 (Dist.Ct.1958); Graham Corp. v. Board of Zoning Appeals, 140 Conn. 1, 97 A.2d 564 (1953); Fitzgerald v. Merard Holding Co., 110 Conn. 130, 147 A. 513 (1929), cert. denied 281 U.S. 732, 50 S.Ct. 247, 74 L.Ed. 1148 (1930); Renieris v. Village of Skokie, 85 Ill.App.2d 418, 229 N.E.2d 345 (1967); Perkins v. Joint City-Council Planning Commission, 480 S.W.2d 166 (Ky.1972); Stow v. Pugsley, 349 Mass. 329, 207 N.E.2d 908 (1965); Expert Steel Treating Co. v. Clawson, 368 Mich. 619, 118 N.W.2d 815 (1962); Kiges v. City of St. Paul, 240 Minn. 522, 62 N.W.2d 363 (1953); State ex rel. Great Lakes Pipe Line Co. v. Hendrickson, 393 S.W.2d 481 (Mo.1965); Donadio v. Cunningham, 58 N.J. 309, 277 A.2d 375 (1971); Reichenbach v. Windward at Southampton, 80 Misc.2d 1031, 364 N.Y.S.2d 283 (1975), aff'd 48 A.D.2d 909, 372 N.Y.S.2d 985, appeal dism'd 38 N.Y.2d 912, 382 N.Y.S.2d 757, 346 N.E.2d 557; Herskovits v. Irwin, 299 Pa. 155, 149 A. 195 (1930); City of Dallas v. Meserole, 155 S.W.2d 1019 (Tex.Civ.App.1941) error ref'd; State ex rel. Morehouse v. Hunt, 235 Wis. 358, 291 N.W. 745 (1940). Cf. Bankoff v. Board of Adjustment, 875 P.2d 1138 (Okla. 1994) (landowner entitled to operate a nonconforming landfill and not have a zoning amendment applied to him retroactively where he had obtained a trial court ruling that the county board should have issued the necessary permit, where $800,000 had been spent on the project, and where the landfill would have been in actual use at the time of the zoning application but for the automatic stay when the county appealed the trial court order); Penn Township v. Yecko Brothers, 420 Pa. 386, 217 A.2d 171 (1966), cert. denied 385 U.S. 826, 87 S.Ct. 60, 17 L.Ed.2d 63 (person who obtained permit and made substantial change of position before change in law may be entitled to nonconforming use—but must show good faith, including that he didn't race to get permit before a proposed change was made in the law). If a permit and/or construction performed thereunder *does* entitle a person to proceed with his nonconforming use, he may nonetheless be held obligated to pursue the remaining construction diligently in order to keep his rights. See Boyd v. Donelon, 193 So.2d 291 (La.App.1966), writ ref'd 250 La. 366, 195 So.2d 643. See generally Annot., Zoning: Building in Course of Construction as Establishing Valid Nonconforming Use or Vested Right to Complete Construction for Intended Use, 89 A.L.R.3d 1051 (1979). As to the desirability of having legislation that creates certainty and fairness in this area of "vested rights," see Hall, State Vested Rights Statutes: Developing Certainty and Equity and Protecting the Public Interest, 40 Urban Law. 451 (2008).

[120] Dienelt v. Monterey County, 113 Cal.App.2d 128, 247 P.2d 925 (Dist.Ct. 1952); Rehfeld v. City of San Francisco, 218 Cal. 83, 21 P.2d 419 (1933); Yuba City v. Cherniavsky, 117 Cal.App. 568, 4 P.2d 299 (Dist.Ct.1931) (non-conforming grocery could not expand); Anderson v. Board of Adjustment, 931 P.2d 517 (Colo.App.1996) (city ordinance did not permit expansion of non-conforming filling station to include similarly non-conforming automated car wash); Mercer Lumber Cos. v. Village of Glencoe, 390 Ill. 138, 60 N.E.2d 913 (1945); Jahnigen v. Staley, 245 Md. 130, 225 A.2d 277 (1967); Seekonk v. Anthony, 339 Mass. 49, 157 N.E.2d 651 (1959); Austin v. Older, 283 Mich. 667, 278 N.W. 727 (1938); County of Freeborn v. Claussen, 295 Minn. 96, 203 N.W.2d 323 (1972); Pisicchio v. Board of Appeals, 165 Misc. 156, 300 N.Y.S. 368 (1937); State ex rel. City Ice & Fuel Co. v. Stegner, 120 Ohio St. 418, 166 N.E. 226 (1929) (was proper to deny permit for ice manufacturers where premises previously used only for storage); State ex rel. Miller v. Cain, 40 Wn.2d 216, 242 P.2d 505 (1952). Cf. Beerwort v. Zoning Board of Appeals, 144 Conn. 731, 137 A.2d 756 (1958) (aim is to lessen and eventually abolish nonconforming uses); Town of Hampton v. Brust, 122 N.H. 463, 446 A.2d 458 (1982) (expansion of non-conforming penny arcade into different area within same building disallowed, though held that arcade operator could not be prevented from replacing an attendant-operated game area with coin-

alterations,[121] but only the normal repair and maintenance, plus minor improvements, made necessary or desirable by the passage of time and by continued use.[122] Where extraction of mineral resources is involved, continued working of the site is usually allowed, even if it entails deepening or enlarging pits or deepening wells, but the drilling

operated machines); City of Keene v. Blood, 101 N.H. 466, 146 A.2d 262 (1958) (denials by zoning authorities of permission to expand nonconforming uses will generally be upheld on appeal); State ex rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923) (application for permit to expand dairy denied; upheld on appeal). But cf. Stagecoach Trails MHC, L.L.C. v. City of Benson, 307 P.3d 989 (Ariz. App. 2013) (replacing a mobile home in a mobile home park is a reasonable alteration and does not extinguish park's status as a non-conforming use); City of Okoboji v. Okoboji Barz, Inc., 746 N.W.2d 56 (Iowa 2008) (sale and service of alcoholic beverages by restaurant held not an expansion of non-conforming use). Accord with the *Stagecoach Trails* case, *supra*, Cleveland MHC, LLC v. City of Richmond, 2015 Miss. LEXIS 230 (Miss. 2015) (city ordinance prohibiting a mobile-home park operator from replacing individual mobile homes violates operator's constitutional rights). Compare Kitsap County v. Kitsap Rifle and Revolver Club, 337 P. 3d 328 (Wash. App.2014) (shooting range extended hours of business, increased types of weapons used, and increased its commercial activities; extended hours held a mere intensification, not an expansion, and thus permissible, but other changes involved expansion and thus not permitted). See generally Note, Municipal Corporations—Police Power and Regulations—Whether or Not Provision in Zoning Ordinance Restricting Extension of Nonconforming Uses Is Arbitrary and Unreasonable, 23 Chi.-Kent L.Rev. 349 (1945); Annot., Construction of New Building or Structure on Premises Devoted to Nonconforming Use as Violation of Zoning Ordinance, 56 A.L.R.4th 769 (1987).

In Pennsylvania, the courts have not totally prohibited expansion of nonconforming uses but have allowed "normal" growth. See Jackson v. Pottstown Zoning Board of Adjustment, 426 Pa. 534, 233 A.2d 252 (1967); William Chersky Joint Enterprises v. City of Pittsburgh, 426 Pa. 33, 231 A.2d 757 (1967); Appeal of Heidorn, 412 Pa. 570, 195 A.2d 349 (1963). But cf. Silver v. Zoning Board of Adjustment, 435 Pa. 99, 255 A.2d 506 (1969), saying a municipality may impose reasonable restrictions on expansion of a nonconforming use.

[121] See City of Earle v. Shackleford, 177 Ark. 291, 6 S.W.2d 294 (1928) (structural alterations not allowed); Piccolo v. Town of West Haven, 120 Conn. 449, 181 A. 615 (1935) (refusal to allow rebuilding of structure destroyed by fire where new building would have greater frontage on street); Selligman v. Von Allmen Brothers, Inc., 297 Ky. 121, 179 S.W.2d 207 (1944); Commercial Club v. Chicago, St. Paul, Minneapolis, & Omaha Railway, 142 Minn. 169, 171 N.W. 312 (1919) (ordinance forbidding enlargement of wooden structures in area); State ex rel. Euclid-Doan Building Co. v. Cunningham, 97 Ohio St. 130, 119 N.E. 361 (1918). It is sometimes said that alterations are so "substantial" that they will be disallowed if the structure would be converted to a markedly different one. See Town of Guilford v. Landon, 146 Conn. 178, 148 A.2d 551 (1959); Goodrich v. Selligman, 298 Ky. 863, 183 S.W.2d 625 (1944). Cf. Wechter v. Board of Appeals, 3 Ill.2d 13, 119 N.E.2d 747 (1954) (tinsmith and woodworking shop could not be converted to spray-paint business); Pross v. Excelsior Cleaning & Dyeing Co., 110 Misc. 195, 179 N.Y.S. 176 (1919) (structural change is determined by considering whether it affects a vital and substantial portion of the premises, whether it changes appearance of the use, whether change is extraordinary in scope or unusual in amount of expenditure, etc.). If substantial alterations are forbidden, so are new buildings devoted to the nonconforming use. See Hanna v. Board of Adjustment, 408 Pa. 306, 183 A.2d 539 (1962). See generally Young, Regulation and Removal of Nonconforming Uses, 12 W.Res.L.Rev. 681 (1961); Annot., Alteration, Extension, Reconstruction, or Repair of Nonconforming Structure or Structure Devoted to Nonconforming Use as Violation of Zoning Ordinance, 63 A.L.R.4th 275 (1988). See also Annot., Change in Area or Location of Nonconforming Use as Violation of Zoning Ordinance, 56 A.L.R.4th 769 (1987).

[122] City of Madison Heights v. Manto, 359 Mich. 244, 102 N.W.2d 182 (1960). See Morin v. Board of Appeals, 352 Mass. 620, 227 N.E.2d 466 (1967) (new, improved instrumentalities can be acquired); Horwitz v. Dearborn Township, 332 Mich. 623, 52 N.W.2d 235 (1952) (aluminum covering could be used to replace canvas); 440 East 102nd Street Corp. v. Murdock, 285 N.Y. 298, 34 N.E.2d 329 (1941); Zoning Board v. Lawrence, 309 S.W.2d 883 (Tex.Civ.App. 1958), ref'd n. r. e. In Dienelt v. County of Monterey, *supra* note 120, it was held that replacing a flagstone patio with a concrete slab patio went beyond mere repair and amounted to a forbidden change. But cf. Endara v. Culver City, 140 Cal.App.2d 33, 294 P.2d 1003 (Dist.Ct.1956) (manufacture of tile ceramics allowed on premises as nonconforming use; permission for expansion of operations properly granted). Accord, Eddins v. City of Lewiston, 150 Idaho 30, 244 P.3d 174 (2010) (replacement of recreational vehicles in manufactured home park constituted a continuation of non-conforming use protected by due process). See generally Babcock, What Should and Can Be Done With Nonconforming Uses, 1972 Planning, Zoning, & Eminent Domain Institute 23; Annot., Zoning: Right to Repair or Reconstruct Building Operating as Nonconforming Use, After Damage or Destruction by Fire or Other Casualty, 57 A.L.R.3d 419 (1974). Some zoning ordinances forbid even repairs, at least if they are extensive in nature. See Fratcher, Constitutional Law: Zoning Ordinances Prohibiting Repair of Existing Structures, 35 Mich.L.Rev. 642 (1937).

of new wells or opening of new mines is likely to be held forbidden.[123]

Zoning ordinances generally provide, or are interpreted as providing, that a nonconforming use is terminated, and there is no right to resume it, when it is abandoned. But abandonment cannot be found from mere discontinuance; it requires a showing of intent to abandon.[124] And

[123] See Beverly Oil Co. v. City of Los Angeles, 40 Cal.2d 552, 254 P.2d 865 (1953) (nonconforming use does not give right to sink new wells or deepen old ones); De Felice v. Zoning Board of Appeals, 130 Conn. 156, 32 A.2d 635 (1943) (change not allowed in method of extraction); Town of Billerica v. Quinn, 320 Mass. 687, 71 N.E.2d 235 (1947) (new pit cannot be opened on another part of land); Fredal v. Forster, 9 Mich.App. 215, 156 N.W.2d 606 (1967) (owner could continue to work the present site but not open new sites). But cf. McCaslin v. City of Monterey Park, 163 Cal.App.2d 339, 329 P.2d 522 (Dist.Ct.1958) (once operation is established, nonconforming use protected as to entire deposit); Hawkins v. Talbot, 248 Minn. 549, 80 N.W.2d 863 (1957) (owner even allowed to develop new gravel beds, beyond those actually excavated at time of ordinance). Regulations under the police power requiring the termination of mining activities have sometimes been upheld. See Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (excavations below water level prohibited, and those already below such level had to be filled); Tulsa Rock Co. v. Board of County Commissioners, 531 P.2d 351 (Okl.App.1974) (further quarrying in limestone quarry prevented, but owner found to have suffered no great or unpreventable hardship). Cf. Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir.1931), cert. denied 284 U.S. 634, 52 S.Ct. 18, 76 L.Ed. 540 (upholding ordinance declaring oil-well drilling operations in residential zone illegal—repealed ordinance which had previously excluded certain land from residential district and had allowed drilling thereon); Seherr-Thoss v. Teton County Bd. of County Comm'rs, 329 P.3d 936 (Wyo. 2014) (applying statute, court allows expansion of gravel quarry under doctrine of diminishing assets).

[124] See Grushkin v. Zoning Board, 26 Conn.Sup. 457, 227 A.2d 98 (1967); Auditorium, Inc. v. City of Wilmington, 47 Del. 373, 91 A.2d 528 (1952) (abandonment not found from mere discontinuance of activity); Union Quarries v. Johnson County, 206 Kan. 268, 478 P.2d 181 (1970); Stieff v. Collins, 237 Md. 601, 207 A.2d 489 (1965); Schack v. Trimble, 28 N.J. 40, 145 A.2d 1 (1958); City of Las Cruces v. Neff, 65 N.M. 414, 338 P.2d 731 (1959); Tigard Sand & Gravel, Inc. v. Clackamas County, 149 Or.App. 417, 943 P.2d 1106 (Or.App.1997) (non-conforming quarry use abandoned where quarrying activity had virtually stopped for 7 years and where for last 2 of those 7 years, site was used for business activity totally unrelated to quarrying); City of Dallas v. Fifley, 359 S.W.2d 177 (Tex.Civ. App.1962), ref'd n. r. e. Thus, a temporary discontinuance of the nonconforming use for a brief period will usually not be found to show abandonment. See Lehmaier v. Wadsworth, 122 Conn. 571, 191 A. 539 (1937); Paul v. Selectmen of Scituate, 301 Mass. 365, 17 N.E.2d 193 (1938); Civic Association v. Horowitz, 318 Mich. 333, 28 N.W.2d 97 (1947); City of Binghampton v. Gartell, 275 App.Div. 457, 90 N.Y.S.2d 556 (1949) (junk business; little activity for 4 years but no abandonment). In Maryland, it has even been said that nonuser is no evidence of abandonment unless it lasts for the statutory period of limitations for actions to recover real property. Landay v. MacWilliams, 173 Md. 460, 196 A. 293 (1938). Cf. Feldstein v. LaVale Zoning Board, 246 Md. 204, 227 A.2d 731 (1967) (clear evidence of inattention or inaction for a reasonable period of time required). A Pennsylvania case once found that discontinuance of a use for twelve years did not, under the particular ordinance, bring about an abandonment. Null v. Power, 391 Pa. 51, 137 A.2d 316 (1958) (mere passage of time not enough). But usually, abandonment can be readily inferred from a lengthy discontinuance—such as several years—unless there is some convincing explanation. See Holloway Ready Mix Co. v. Monfort, 474 S.W.2d 80 (Ky.1968) (quarry was not used for ten years); Attorney General v. Johnson, 355 S.W.2d 305 (Ky.1962) (nonconforming grocery store had ceased 5 years ago; owner wanted to establish nonconforming laundry, and ordinance allowed shift from one nonconforming business to another, but abandonment here found); Longo v. Eilers, 196 Misc. 909, 93 N.Y.S.2d 517 (1949). Ordinances sometimes indicate that non-use for a prescribed period of time shall be determinative of abandonment; some courts still tend to find abandonment only if the requisite intent is established. See Smith v. Howard, 407 S.W.2d 139 (Ky.1966) (intent or such lack of diligence as to amount to abandonment required); Dusdal v. City of Warren, 387 Mich. 354, 196 N.W.2d 778 (1972). But it is usually held that such legislation *can* remove the intent requirement if this is made sufficiently clear. See Franmor Realty Corp. v. LeBoeuf, 201 Misc. 220, 104 N.Y.S.2d 247 (1951), aff'd 279 App.Div. 795, 109 N.Y.S.2d 525, appeal denied 279 App. Div. 874, 110 N.Y.S.2d 910; State ex rel. Peterson v. Burt, 42 Wis.2d 284, 166 N.W.2d 207 (1969). Ordinances forbidding resumption after a designated period of discontinuance have also been generally upheld if found reasonable. Wilson v. Edgar, 64 Cal.App. 654, 222 P. 623 (Dist.Ct.1923); Marchese v. Norristown Borough Zoning Board of Adjustment, 2 Pa.Cmwlth. 84, 277 A.2d 176 (1971) (with list of cases); State ex rel. Brill v. Mortenson, 6 Wis.2d 325, 96 N.W.2d 603 (1959) (discontinuance for one year; not necessary under this ordinance that owner *voluntarily* relinquish nonconforming use in order for abandonment to occur). Cf. Kootenai County v. Harriman-Sayler, 293 P.3d 637 (Idaho 2012) (applying ordinance that provided non-conforming use that is discontinued for 6 consecutive months, or for 18 months in a 3-year period, is terminated); State ex rel. Harris v. Zoning Board of Appeal and Adjustment, 221 La. 941, 60 So.2d 880 (1952) (where ordinance forbids resumption after property has been vacant for six months, board of adjustment cannot authorize revival of nonconforming use); Bither v. Baker Rock Crushing Co., 249 Or. 640, 438 P.2d 988 (1968), mod'd 249 Or. 640,

the act of abandonment must be a voluntary one;[125] thus, a temporary discontinuance due to fire, act of God, or governmental activities will not work a surrender of the nonconforming use[126] unless a statute or ordinance clearly so provides. But what if the relevant legislation *does* so provide? A considerable number of zoning ordinances now state that nonconforming uses damaged or destroyed, even through no fault of the owner, cannot be re-built as nonconforming structures. In other words, the right to the nonconformity is lost by statute, despite the lack of voluntary action or intent. Such limitations on right to rebuild usually apply where the buildings, improvements, etc. have been totally or substantially destroyed; and legislation so providing has been upheld.[127] Indeed, such provisions can be looked upon as part of a general trend toward

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440 P.2d 368 (ordinance prohibiting resumption after 6 months' discontinuance assumed valid, but no discontinuance here found). In Rogers v. West Valley City, 2006 UT App. 302, 142 P.3d 554 (2006), it was held that a city zoning ordinance providing that discontinuance of a non-conforming use for a period of more than a year constituted abandonment of such use precluded consideration of the landowner's intent.

Where the premises are *used*, but for a purpose that conforms to the zoning law, much the same rules apply as where the property is not utilized at all: A temporary change to a *conforming* use does not indicate abandonment. State ex rel. Morehouse v. Hunt, *supra* note 119. But a lengthy utilization of the premises for a conforming purpose is strong evidence of abandonment of the nonconforming use. See Branch v. Powers, 210 Ark. 836, 197 S.W.2d 928 (1946) (use of garage for conforming purpose for 2 years prior to passage of zoning ordinance and 9 years thereafter).

What of a change from one nonconforming use to another? This may be dealt with under the rules on alterations, abandonment, etc. See Blake v. City of Phoenix, 157 Ariz. 93, 754 P.2d 1368 (App. 1988) (where prior owner of non-conforming use had run quiet business of growing orchids in greenhouses while current owners ran busy retail nursery trade, this was found an abandonment of non-conforming use). But even aside from such rules, it has sometimes been stated that a change from one nonconforming use to another causes a loss of the right. See Town of Montclair v. Bryan, 16 N.J.Super. 535, 85 A.2d 231 (1951); Parks v. Board of County Commissioners, 11 Or.App. 177, 501 P.2d 85 (1972); 2 Metzenbaum, The Law of Zoning 1241 (2d ed. 1955). Some ordinances, however, allow, or can be read as allowing, a change in the direction of conformity. See Hagman, Larson, & Martin, California Zoning Practice § 9.22 (1969). Cf. Baker v. Town of Sullivan's Island, 279 S.C. 581, 310 S.E.2d 433 (App. 1983) (conversion of apartment building to condominiums not so substantial a change as to amount to a switch from one non-conforming use to another). See generally Annot., Change in Type of Activity of Nonconforming Use as Violation of Zoning Ordinance, 61 A.L.R.4th 902 (1988); Annot., Zoning—Change in Volume, Intensity, or Means of Performing Nonconforming Use as Violation of Zoning Ordinances, 61 A.L.R.4th 806 (1988). See also Triangle Fraternity v. City of Norman, 63 P.3d 1 (Okla. 2003) (proposed use of house as fraternity house was same as church's use of house as a retired women's boarding house, and thus fraternity was entitled to extension of church's non-conforming use).

It has been held that failure to obtain a city license for a non-conforming use is not in itself abandonment of the use. Mayor & City Council of Baltimore v. Dembo, Inc., 123 Md.App. 527, 719 A.2d 1007 (1998).

[125] See Green v. Copeland, 286 Ala. 341, 239 So.2d 770 (1970); Navin v. Early, 56 N.Y.S.2d 346 (1945); Empire City Racing Association v. City of Yonkers, 132 Misc. 816, 230 N.Y.S. 457 (1928) (race meets held twice a year; no intent to abandon use as race track; building destroyed by fire could be rebuilt); Rowton v. Alagood, 250 S.W.2d 264 (Tex.Civ.App.1952). See generally Strauss & Giess, Elimination of Nonconformities: The Case of Voluntary Discontinuance, 25 Urban Law. 159 (1993).

[126] See Annot., Zoning: Right to Repair or Reconstruct Building Operating as Nonconforming Use, After Damage or Destruction by Fire or Other Casualty, 57 A.L.R.3d 419 (1974); Annot., Zoning: Right to Resume Nonconforming Use of Premises After Involuntary Break in the Continuity of Nonconforming Use Caused by Governmental Activity, 56 A.L.R.3d 138 (1974); Annot., Right to Resume Nonconforming Use of Premises After Involuntary Break in the Continuity of Nonconforming Use Caused by Difficulties Unrelated to Governmental Activity, 56 A.L.R.3d 14 (1974). But if the discontinuance appears voluntary or is unexplained, an abandonment will often be found. See Annot., Zoning: Right to Resume Nonconforming Use of Premises After Voluntary or Unexplained Break in the Continuity of Nonconforming Use, 57 A.L.R.3d 279 (1974).

[127] See A. H. Jacobson Co. v. Commercial Union Assurance Co., 83 F.Supp. 674 (D.Minn.1949); State v. Hillman, 110 Conn. 92, 147 A. 294 (1929); D'Agostino v. Jaguar Realty Co., 22 N.J.Super. 74, 91 A.2d 500 (1952) (total destruction; not entitled to rebuild); Jetter v. Hofheins, 190 Misc. 99, 70 N.Y.S.2d 808 (1947); Koeber v. Bedell, 254 App.Div. 584, 3 N.Y.S.2d 108 (1938), aff'd 280 N.Y. 692, 21 N.E.2d 200; Appeal of Berberian, 351 Pa. 475, 41 A.2d 670 (1945); Haase v. City of Memphis, 149 Tenn. 235, 259 S.W. 545 (1924); State ex rel. Covenant Harbor Bible Camp v. Steinke, 7 Wis.2d 275, 96 N.W.2d 356 (1959) (right to nonconforming use lost if use is accidentally destroyed in large measure). Some ordinances provide that a nonconforming use cannot be repaired or rebuilt if destroyed to the extent of a specified percentage of its former

the gradual elimination of all nonconforming uses. A number of zoning ordinances now provide for "amortization" of such uses: the nonconformity with the zoning ordinance is allowed to remain a specified length of time after the ordinance goes into effect—say, ten years—, but then the nonconforming use must be terminated. This may be considered to grant the user a period of relative monopoly—since presumably, uses of the same nonconforming type won't be allowed to "start up" in the area if they don't pre-date the zoning ordinance—in return for which the eventual termination of the use is being required. Such amortization ordinances have been upheld if the period provided is found a reasonable one, considering the amount of investment involved in the particular use.[128]

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value; such legislation has been upheld. Moffatt v. Forrest City, 234 Ark. 12, 350 S.W.2d 327 (1961) (if destroyed to extent of 60% of value); Baird v. Bradley, 109 Cal.App.2d 365, 240 P.2d 1016 (Dist.Ct.1952) (50% of value and 60% of physical proportion); Bobandal Realties, Inc. v. Worthington, 21 App.Div.2d 784, 250 N.Y.S.2d 575 (1964), aff'd 15 N.Y.2d 788, 257 N.Y.S.2d 588, 205 N.E.2d 685 (1965) (50% of value). Cf. O'Mara v. City Council, 238 Cal.App.2d 836, 48 Cal.Rptr. 208 (Dist.Ct.1965) (market value must be considered in determining degree of destruction). Washington State applies a common-law rule that abandonment applies only to nonconforming land *uses*, not nonconforming structures employed in conjunction with the nonconforming uses. See Rosema v. City of Seattle, 166 Wash. App. 293, 269 P. 3d 393 (2012). Cf. Total Outdoor Corp. v. City of Seattle Dept. of Planning & Development, 348 P. 3d 766 (Wash. App. 2015).

[128] Village of Oak Park v. Gordon, 32 Ill.2d 295, 205 N.E.2d 464 (1965) (entitled to presumption of reasonableness, like other zoning ordinances); Spurgeon v. Board of Commissioners, 181 Kan. 1008, 317 P.2d 798 (1957); Grant v. City of Baltimore, 212 Md. 301, 129 A.2d 363 (1957) (billboards had to be removed from residential areas within 5 years; upheld); McKinney v. Riley, 105 N.H. 249, 197 A.2d 218 (1964); Village of Larchmont v. Sutton, 30 Misc.2d 245, 217 N.Y.S.2d 929 (1961) (nonconforming signs had to be removed within 15 months). Cf. Harbison v. City of Buffalo, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42 (1958) (junkyard in residential zone had to be removed within 3 years; case remanded for determination of reasonableness of length of time). See generally Fell, Amortization of Nonconforming Uses, 24 Md. L.Rev. 323 (1964); Koegel, Elimination of Nonconforming Uses, 35 Va.L.Rev. 348 (1949); Moore, Termination of Nonconforming Uses, 6 Wm. & M. L. Rev. 1 (1965); Norton, Elimination of Nonconforming Uses and Structures, 20 L. & Contemp. Prob. 305 (1955); Sussna, Abatement of Nonconforming Uses and Structures, 44 Conn.B.J. 589 (1970); Whitnall, Abatement of Nonconforming Uses, 2 Institute on Planning and Zoning 131 (1962); Note, Regulation of Urban Nonconforming Uses in Arkansas: Limitation and Termination, 16 Ark.L.Rev. 270 (1962); Note, The Abatement of Pre-Existing Nonconforming Uses Under Zoning Laws: Amortization, 57 Nw. U.L.Rev. 323 (1962); Note, Termination of Nonconforming Uses: *Harbison* to the Present, 14 Syracuse L.Rev. 62 (1962).

It has been noted that early authorities on zoning expected that nonconforming uses would be few in number and would rather quickly disappear but that this has not proven true: nonconforming uses, having a degree of monopoly in their neighborhoods, often thrive and become more firmly entrenched with time. Note, Nonconforming Uses: A Rationale and an Approach, 102 U.Pa.L.Rev. 91, 94 (1953). Thus, pressure to eliminate such uses has grown. See Bartholomew, Non-Conforming Uses Destroy the Neighborhood, 1 J. Land & P. U. Econ. 96 (1939); Mandelker, Prolonging the Nonconforming Use: Judicial Restriction of the Power to Zone in Iowa, 8 Drake L.Rev. 23 (1958); Comment, The Elimination of the Nonconforming Use in California, 8 Hastings L.J. 64 (1956). It is often stated in general terms that nonconforming uses are not favored and that the law encourages their elimination. See Farr v. Town of Manchester, 139 Conn. 577, 95 A.2d 792 (1953) (nonconforming uses should be reduced as rapidly as law allows); Attorney General v. Johnson, *supra* note 124 (law ordains the gradual elimination of such uses); Hay v. Board of Adjustment of Fort Lee, 37 N.J.Super. 461, 117 A.2d 650 (1955) (policy of law is to restrict nonconforming uses closely and not allow their expansion); Hanna v. Board of Adjustment, 408 Pa. 306, 183 A.2d 539 (1962) (nonconforming uses should be reduced as speedily as law and constitution allow). Cf. City of Tucson v. Clear Channel Outdoor, Inc., 218 Ariz. 172, 181 P.3d 219 (App. 2008) (in order to support the public policy of eliminating non-conforming uses, courts do not follow the customary rule of construing zoning regulations in favor of property owners).

Amortization has been applied with particular frequency in situations involving nonconforming signs. See Durden, Sign Amortization Laws: Insight into Precedent, Property, and Public Policy, 35 Capital U.L. Rev. 891 (2007). On constitutional limits on elimination of nonconforming uses, see generally O'Reilly, The Nonconforming Use and Due Process of Law, 23 Geo.L.J. 218 (1935); Annot., Validity of Provisions for Amortization of Nonconforming Uses, 8 A.L.R.5th 391 (1992). On the special situation in Pennsylvania, see PA Northwestern Distributors, Inc. v. Zoning Hearing Bd. of Township of Moon, 526 Pa. 186, 584 A.2d 1372 (1991), noted 37 Villanova L. Rev. 161 (1992) (amortization of lawful nonconforming use is per se confiscatory and violative of Pennsylvania Constitution). On the reasonableness of the time period allowed for amortization, see Reynolds, The Reasonableness of Amortization Periods for Nonconforming Uses—Balancing the Private Interest and the Public Welfare, 34 Wash. U.J. Urban & Contemp. L. 99 (1988). See generally Lawrence, A Proposal to Amend the Michigan Zoning Enabling Act to Allow Amortization of Nonconforming Uses, 1998 Detroit C.L. Mich. St.

§ 18.6 Zoning—Procedure for Enactment

Procedures for the enactment of municipal zoning laws are laid down by state statute and/or home-rule charter. It has often been stated that these procedures must be strictly followed in order for the intended legislation to be valid.[129] Generally, municipal zoning laws must take the form of ordinances, not mere resolutions.[130] Besides the usual requirements for enactment of ordinances, three special requirements for *zoning* ordinances must often be met: (1) It is frequently provided—usually by city charters—that municipalities must submit proposed legislation to local (or occasionally, county-wide) planning commissions before the legislation is finally approved by the governing body. Occasionally, the planning commission's *approval* must be obtained; or if it is not obtained, the legislation can be passed only by some super-majority of the city governing body. But most often, the planning commission has authority only to *recommend* passage or non-passage of the legislation. Nonetheless, the requirement of submission to the planning commission—for its recommendation or whatever action it is empowered to take—is nearly always treated as mandatory.[131]

U.L. Rev. 653. A good review of the authorities on the constitutionality of amortization provisions is found in Note, A Taking Without Just Compensation? The Constitutionality of Amortization Provisions for Nonconforming Uses, 109 W. Va. L. Rev. 225 (2006). For a summary of state court cases on the constitutionality of amortization legislation, see Michaels, Amortization and the Constitutional Methodology for Terminating Non-conforming Uses, 41 Urban Law. 807 (2009), finding that only 3 states—Missouri, Ohio, and Pennsylvania—have ruled that amortization is a per se unconstitutional taking; that the law in one of these—Ohio—is in doubt; and that all the rulings of unconstitutionality have been based on *state* constitutional provisions, not the U.S. Constitution. *Id.* at 813–14, concluding that "In the vast majority of states, amortization provisions have been held valid where reasonable."

A few states have special provisions for the condemning of nonconforming uses under the power of eminent domain. See, *e.g.*, Mich. Compiled Laws Ann. § 125.583a; Minn.Stat.Ann. § 462.12.

[129] Manning v. Reilly, 2 Ariz.App. 310, 408 P.2d 414 (1965) (if there isn't substantial compliance with statutory rules, legislation is void); Bowling Green-Warren County Airport Board v. Long, 364 S.W.2d 167 (Ky. 1962); Stevens v. Madison Heights, 358 Mich. 90, 99 N.W.2d 564 (1959); Schroeppel v. Spector, 43 Misc.2d 290, 251 N.Y.S.2d 233 (1963) (procedures must be strictly adhered to); State v. Thomasson, 61 Wn.2d 425, 378 P.2d 441 (1963) (map not included in zoning resolution). See Grantwood Lumber Co. v. Schweitzer, 7 N.J.Misc. 1016, 147 A. 741 (1929) (ordinance not read in final form before passage as required by statute; held void). But cf. Hopping v. Cobb County Fair Association, 222 Ga. 704, 152 S.E.2d 356 (1966) (rezoning action was prolonged 8 days past time limit; valid where no harm shown from delay); Rossi v. Township of Richfield, 60 Mich.App. 34, 230 N.W.2d 553 (1975) (publication without the required zoning map; but other requirements were met; held valid).

[130] City of Hutchins v. Prasifka, 450 S.W.2d 829 (Tex.1970). On the difference between "ordinances" and "resolutions," see Chapter 11 *supra*.

[131] Kissinger v. City of Los Angeles, 161 Cal.App.2d 454, 327 P.2d 10 (Dist.Ct.1958); Florida Tallow Corp. v. Bryan, 237 So.2d 308 (Fla.App.1970); Davis v. Imlay Township, 7 Mich.App. 231, 151 N.W.2d 370 (1967) (county zoning authority). Of course, if the power of the planning commission is only to *recommend*, its recommendation need not be followed by the local legislative body. See Fleetwood Development Corp. v. Vestavia Hills, 282 Ala. 439, 212 So.2d 693 (1968). Cf. McVeigh v. City of Battle Creek, 350 Mich. 214, 86 N.W.2d 279 (1957) (zoning board has only the powers given it by statute, charter, or ordinance). The final decision on zoning matters must rest with the city governing body, not with a planning or zoning commission; otherwise there is an unlawful delegation of authority. See Jackson v. Guilford County Board of Adjustment, 275 N.C. 155, 166 S.E.2d 78 (1969). See generally Anderson, Brees & Reninger, A Study of American Zoning Board Composition and Public Attitudes Toward Zoning Issues, 40 Urban Law. 689 (2008), noting that these local administrative bodies go by various designations, including Planning & Zoning Commission, Board of Zoning Adjustment, or Board of Zoning Appeals. *Id.* at 689.

But even though a planning or zoning commission's power is thus limited, members should not participate in a matter in which they have a pecuniary or other personal interest; and passage of a recommended measure may be invalidated if such a vote is cast. See Buell v. City of Bremerton, 80 Wn.2d 518, 495 P.2d 1358 (1972) (chairman of planning commission had possibility of interest in rezoned property). Cf. Narrowsview Preservation Association v. City of Tacoma, 84 Wn.2d 416, 526 P.2d 897 (1974) (presence on planning commission of member whose employer was bank to which property sought to be rezoned was pledged

(2) Statutes and/or charters usually now provide that a public hearing must be held prior to the passage of zoning laws and amendments, and that proper notice be given of such hearing. It is often specified that the notice must be to the general public (as through newspaper publication, etc.) and/or to specified, affected property owners (as by mailing of notice to those within the affected area and a certain distance therefrom). These requirements are, like the above-mentioned requirement of submission to a planning commission, treated as mandatory; and a zoning ordinance passed without the required and properly noticed hearing will be void.[132] (3) Often it is provided by statute or charter that, in addition to any required public hearing and notice thereof, or even where no hearing is required—, there must be notice given the community of the proposed zoning legislation itself, as through newspaper publication thereof. Again, such a requirement is mandatory in order for the legislation to be valid.[133]

If zoning laws are properly passed, a presumption of their reasonableness, validity, and constitutionality then attaches to them in any subsequent judicial or administrative

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as collateral held to violate "appearance of fairness" doctrine). In some states, the presence on a legislative or quasi-legislative body of a person with a personal interest in a matter will, however, invalidate action taken thereon only if that person voted and his or her vote was determinative. See generally Chapter 11 *supra.*

[132] Saks & Co. v. City of Beverly Hills, 107 Cal.App.2d 260, 237 P.2d 32 (Dist.Ct. 1951); Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308 (1929); Hutchinson v. Board of Zoning Appeals, 138 Conn. 247, 83 A.2d 201 (1951); Moon v. Smith, 138 Fla. 410, 189 So. 835 (1939); Whittemore v. Town Clerk of Falmouth, 299 Mass. 64, 12 N.E.2d 187 (1937); Krajenke Buick Sales v. Kopkowski, 322 Mich. 250, 33 N.W.2d 781 (1948); Wippler v. Hohn, 341 Mo. 780, 110 S.W.2d 409 (1937); Sackett Lake Property Owners Association v. Levine, 268 App.Div. 809, 48 N.Y.S.2d 490 (1944), appeal denied 268 App.Div. 934, 51 N.Y.S.2d 748; Voight v. Saunders, 206 Okl. 318, 243 P.2d 654 (1952); State ex rel. Gulf Refining Co. v. De France, 89 Ohio App. 334, 101 N.E.2d 782 (1950); Fierst v. William Penn Memorial Corp., 311 Pa. 263, 166 A. 761 (1933); State ex rel. Lightman v. City of Nashville, 166 Tenn. 191, 60 S.W.2d 161 (1933); Bolton v. Sparks, 362 S.W.2d 946 (Tex.1962). See Hart v. Bayless Investment & Trading Co., 86 Ariz. 379, 346 P.2d 1101 (1959) (no formal hearing after requisite notice; zoning commission and county board lacked jurisdiction to adopt measure).

Even if the proper hearing is held, zoning legislation subsequently passed can be voided on the ground that proper notice of such hearing was not given. See Anderson v. Judd, 158 Colo. 46, 404 P.2d 553 (1965); Carson v. McDowell, 203 Kan. 40, 452 P.2d 828 (1969) (notice not given sufficiently far in advance). Cf. Hart v. Bayless Investment & Trading Co., *supra* (news article did not suffice as an official notice). And once the required hearing is held, the legislation therein discussed must be passed within a reasonable time, or else it cannot be passed at all without *another* properly announced hearing being held. See Gricus v. Superintendent of Buildings, 345 Mass. 687, 189 N.E.2d 209 (1963) (more than 5 years was unreasonable length of time). The hearing, and notice thereof, are usually treated as being required only by legislation, but there is some argument that due process requires that affected property-owners be given a reasonable opportunity to be heard. See Masters v. Pruce, 290 Ala. 56, 274 So.2d 33 (1973).

On the purposes intended to be served by hearings on zoning legislation, see Pate v. City of Bethany, 672 P.2d 677 (Okl. App. 1983) (intended to protect a protestant's right to be heard and to afford protestants a chance to explain how they think their interests are affected by proposed changes and how public at large is affected, and to bring to attention of legislative body any relevant fact that might have been overlooked). Cf. Lai Chun Chan Jin v. Board of Estimate, 115 Misc.2d 774, 454 N.Y.S.2d 601 (1982), judgment rev'd 92 A.D.2d 218, 460 N.Y.S.2d 28 (1983) (community must be given adequate notice of hearing so that public can participate in decision-making).

[133] See Gendron v. Borough of Naugatuck, 21 Conn.Sup. 78, 144 A.2d 818 (1958) (information was carried in news stories in newspaper; held insufficient notice). Again, the requirement has usually been treated as legislatively, not constitutionally, imposed. See Lawton v. City of Austin, 404 S.W.2d 648 (Tex.Civ.App.1966), ref'd n. r. e. (notice provisions of statutes found constitutionally adequate and valid). But some authority now holds that notice to affected persons is required by due process. Tolman v. Salt Lake County, 20 Utah 2d 310, 437 P.2d 442 (1968). See Masters v. Pruce, *supra* note 132.

Notice requirements, relating either to notice of hearings or notice of the legislation itself, will be held fulfilled if there has been substantial compliance. See Nesbit v. City of Albuquerque, 91 N.M. 455, 575 P.2d 1340 (1977) (notice must fairly apprise average citizen as to general purpose of what is contemplated; here found inadequate). See generally 1A Antieau, Municipal Corporation Law §§ 7.06–.07 (1998).

challenge.[134] The burden of proof is on anyone who asserts the unreasonableness or lack of valid purpose.[135] One frequent method of stating this general rule is by saying that if the zoning law is "fairly debatable," it will be upheld.[136] That is, if there could be debate over the reasonableness of the ordinance, if there is room for legitimate difference of

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[134] Zahn v. Board of Public Works, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074 (1927); American Wood Products Co. v. City of Minneapolis, 35 F.2d 657 (8th Cir.1929); McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 264 P.2d 932 (1953), cert. denied 348 U.S. 817, 75 S.Ct. 29, 99 L.Ed. 644 (1954); City of Miami v. Rosen, 151 Fla. 677, 10 So.2d 307 (1942) (good discussion of nature of municipalities and municipal ordinances); Krom v. City of Elmhurst, 8 Ill.2d 104, 133 N.E.2d 1 (1956); City of Louisville v. Bryan S. McCoy Inc., 286 S.W.2d 546 (Ky.1955); Schertzer v. City of Somerville, 345 Mass. 747, 189 N.E.2d 555 (1963); Bzovi v. City of Livonia, 350 Mich. 489, 87 N.W.2d 110 (1957); Bogert v. Township of Washington, 25 N.J. 57, 135 A.2d 1 (1957); Bond v. Cooke, 237 App.Div. 229, 262 N.Y.S. 199 (1932); Midgarden v. City of Grand Forks, 79 N.D. 18, 54 N.W.2d 659 (1952); Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 110 N.E.2d 440 (1952), appeal dism'd 158 Ohio St. 258, 108 N.E.2d 679 (same presumption of validity that applies to other legislative acts). See Dawson Enterprises, Inc. v. Blaine County, 98 Idaho 506, 567 P.2d 1257 (1977) (zoning ordinances sometimes said to have strong presumption of validity); Pierce v. Town of Wellesley, 336 Mass. 517, 146 N.E.2d 666 (1957) (judgment of municipal legislative body assumed reasonable); Dodge Mill Land Corp. v. Town of Amherst, 61 A.D.2d 216, 402 N.Y.S.2d 670 (1978) (if zoning ordinance enacted in accord with comprehensive plan, is entitled to strongest possible presumption of validity). On challenges to local land-use decisions, see generally Nelson, Comparative Judicial Land-Use Appeals Processes, 27 Urban Law. 251 (1995), noting that most judicial systems in the United States are not well equipped to handle zoning appeals but discussing innovative methods that had been tried in Florida, New Jersey and Oregon.

It has been stated that the presumption of validity extends to the zoning body's application and interpretation of its own zoning ordinances. Crown Point Dev., Inc. v. City of Sun Valley, 144 Idaho 72, 156 P.3d 573 (2007) (city council had denied plat application for subdivision; court says that zoning agency's action should be affirmed unless court finds that agency's findings or decisions are in violation of constitutional or statutory provisions, are in excess of agency's statutory authority, are made upon unlawful procedure, are not supported by substantial evidence, *or* are arbitrary, capricious, or an abuse of discretion). As to when "abuse of discretion" can be found, see Botz v. Bridge Canyon Planning & Zoning Comm'n, 289 P.3d 180 (Mont. 2012) (abuse of discretion occurs when the information upon which the municipal entity based its decision is so lacking in fact and foundation that it is clearly unreasonable).

[135] See Board of County Commissioners v. Simmons, 177 Colo. 347, 494 P.2d 85 (1972) (person alleging invalidity must prove it beyond a reasonable doubt); State ex rel. Prats v. City Planning & Zoning Commission, 59 So.2d 832 (La.App.1952); State v. Mundet Cork Corp., 8 N.J. 359, 86 A.2d 1 (1952), 344 U.S. 819, 73 S.Ct. 14, 97 L.Ed. 637; Fra-Nat Builders Inc. v. Town of Oyster Bay, 16 Misc.2d 851, 183 N.Y.S.2d 830 (1959) (person attacking ordinance must show unreasonableness beyond a reasonable doubt); Smith v. City of Brookfield, 272 Wis. 1, 74 N.W.2d 770 (1956). But see Pinellas County v. Dynamic Investments, Inc., 279 So.2d 97 (Fla.App.1973) (burden for sustaining restrictions is on zoning authority). Certainly the burden may *shift* to the zoning authorities once the presumption of validity is overcome. See Cole-Collister Fire Protection District v. City of Boise, 93 Idaho 558, 468 P.2d 290 (1970). And some observers feel that the presumption of validity often is allowed to disappear very readily. See 1A Antieau, Municipal Corporation Law § 7.23, at 7–61 (1998). See Yurczyk v. Yellowstone County, 319 Mont. 169, 83 P.3d 266 (2004), as an example of a case carefully considering all the possible police-power grounds for sustaining the law, and then rejecting all those grounds. The case involved a modular home that violated a zoning ordinance requiring on-site construction of dwellings. The court found that no health and only minimal safety concerns were addressed by the law and found that no welfare concern that the law promoted property values or aided residents' ability to control their environment was addressed by the law.

[136] See City of Miami Beach v. Wiesen, 86 So.2d 442 (Fla.1956); Eckes v. Board of Zoning Appeals, 209 Md. 432, 121 A.2d 249 (1956); Thomas v. Bedford, 11 N.Y.2d 428, 230 N.Y.S.2d 684, 184 N.E.2d 285 (1962); Partain v. City of Brooklyn, 101 Ohio App. 279, 133 N.E.2d 616 (1956); Mid-Continent Life Ins. Co. v. Oklahoma City, 701 P.2d 412 (Okl.1985) (zoning is legislative function and if the validity of a zoning ordinance is fairly debatable, municipality's legislative judgment must stand); Heisler v. Thomas, 651 P.2d 1330 (Okl.1982) (role of judiciary in reviewing zoning classification is to determine if it is unreasonable, arbitrary or an unconstitutionally unequal exercise of police power; decision to retain a single-family zoning classification will be upheld so long as it is fairly debatable); McNair v. Oklahoma City, 490 P.2d 1364 (Okl.1971) (validity of amendment to zoning ordinance challenged). Cf. O'Rourke v. City of Tulsa, 457 P.2d 782 (Okl.1969) (aggrieved person may challenge zoning by petition for injunction without first applying for variance; but where city governing body has refused to rezone, its decision won't be overturned if it is fairly debatable). The "fairly debatable" rule is applied to original zoning and classifications *and* to rezoning or denials thereof. See Bradley v. Payson City Corp., 2003 UT 16, 70 P.3d 47 (2003) (municipal land use decisions as a whole are generally entitled to a great deal of deference; city council's denial of zoning change would not be overturned where decision was reasonably debatable).

opinion, then the courts will yield to the legislative determination.[137] This deference occurs because municipal authorities are assumed to be familiar with local conditions and thus in the best position to plan the development of their community.[138] The courts

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[137] Trust Co. v. City of Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951). See Mueller v. C. Hoffmeister Undertaking & Livery Co., 343 Mo. 430, 121 S.W.2d 775 (1938) (if zoning classification is doubtful, judgment of municipal authorities must be respected). Cf. Spencer v. Kootenai County, 180 P.3d 487 (Idaho 2008) (planning and zoning decisions are entitled to a strong presumption of validity on review, including a county zoning board's application and interpretation of its own zoning ordinances). See also Sterk & Brunelle, Zoning Finality: Reconceptualizing Res Judicata Doctrine in Land Use Cases, 63 Fla. L. Rev. 1139 (2011).

Since the decision of the governing body on how to zone (or rezone) property is a legislative determination (not a judicial or quasi-judicial one), it cannot be appealed to the state courts, but can be attacked in such courts by means of a suit for mandamus or injunction. Gregory v. Board of County Commissioners, 514 P.2d 667 (Okl. 1973). Cf. Garrett v. Oklahoma City, 594 P.2d 764 (Okl.1979) (persons aggrieved by zoning may seek injunction). Mandamus may be used not only to attempt to compel municipal action to change zoning regulations but also to compel enforcement of existing zoning regulations. See Annot., Mandamus to Compel Zoning Officials to Cancel Permit Granted in Violation of Zoning Regulation, 68 A.L.R.3d 166 (1976), noting a split of authority as to whether mandamus is available to *cancel* building permits. Clearly, mandamus is available to compel *issuance* of building permits where such issuance is dictated by law. But mandamus is always considered an extraordinary remedy, and a strong case of dereliction of duty must be established before the writ will issue. See generally 52 Am.Jur.2d Mandamus §§ 4, 160, 216 (on compelling issuance of building permits) (1970). On mandamus, see also chapter on extraordinary remedies *infra*. Statutes frequently designate the methods of challenging zoning amendments, and such methods are likely to be considered exclusive. See Bischoff v. Hennessy, 251 S.W.2d 582 (Ky. 1952). But unless a statute prescribes other methods that are deemed exclusive, a declaratory judgment action is generally recognized as a possible means of attacking amendments. See Holdredge v. City of Cleveland, 218 Tenn. 239, 402 S.W.2d 709 (1966).

It is usually held that a party challenging a zoning ordinance need not exhaust legislative remedies prior to the challenge but must exhaust administrative remedies, such as applying for a variance. This is subject to the qualifications that (1) if legislative remedies have not been pursued, the courts will assume the ordinance would be applied in the manner most generous, consistent with its terms, to the protestant's wishes, and (2) the courts will not require that clearly futile administrative remedies be pursued. See Note, Exhausting Administrative and Legislative Remedies in Zoning Cases, 48 Tulane L. Rev. 665 (1974). Cf. Sikora v. City of Rawlins, 2017 WY 55, 394 P.3d 472 (2017) (property owner had sufficient notice of what she believed to be zoning violation by neighbors' construction of new garage to trigger requirement that she exhaust administrative remedies prior to bringing declaratory judgment action). On the complicated situation in Illinois regarding the exhaustion issue, see Babcock, The Unhappy State of Zoning Administration in Illinois, 26 U. Ill. L. Rev. 509, 522–32 (1959). As to who has standing to challenge the validity or application of zoning laws under which a land-use permit is granted or denied, see Wilson, "I Don't Live Next Door, But I Do Drive by on the Nearby Highway": Recent Developments in the Law of Standing in Court Cases Challenging Land Use Permits, 39 Urban Law. 711 (2007), analyzing opinions in five states, all purporting to apply the standard that the plaintiff must show "particularized injury" or the potential thereof. Cf. Johnson v. Blaine County, 146 Idaho 916, 204 P.3d 1127 (2009) (adjoining landowner was affected person as to approval of planned unit development and thus could seek judicial review of the approval); Weber Coastal Bells Limited Partners v. Metro, 352 Or. 122, 282 P.3d 822 (2012) (citizen group had standing to challenge Land Use Board of Appeals decision). See generally on standing in zoning cases, notes 72–73, *supra*, and accompanying text.

On the legislative nature of zoning, see also note 19 of this chapter and accompanying text *supra*.

[138] Luery v. Zoning Board, 150 Conn. 136, 187 A.2d 247 (1962) (municipal judgment will not be overridden unless is definite breach of duty); Montgomery County Council v. Shiental, 249 Md. 194, 238 A.2d 912 (1968) (courts won't substitute their judgment for the expertise of the zoning authorities); Burnham v. Board of Appeals, 333 Mass. 114, 128 N.E.2d 772 (1955) (much weight must be given the judgment of the local legislative body since it is familiar with local conditions). Cf. City of Miami Beach v. Schauer, 104 So.2d 129 (Fla.App. 1958), aff'd 112 So.2d 838 (Fla.1959) (amendment of zoning ordinance is legislative act; court won't ordinarily scrutinize motives of city council).

While the *wisdom* of the legislative decision will not be questioned by the court, it should be noted that votes on zoning matters may sometimes be invalidated if someone with a personal interest in the matter has participated in the decision. See note 129 *supra*. See generally Note, Municipal Corporations—Zoning—Disqualification of Councilman for Personal Interest, 57 Mich. L.Rev. 423 (1959); Annot., Motive of Members of Municipal Authority Approving or Adopting Zoning Ordinance or Regulation as Affecting its Validity, 71 A.L.R.2d 568 (1960). And it has been held that one who claims fraud or corruption in the enactment or administration of zoning ordinances must only prove his or her claim by a preponderance of the evidence. Wyman v. Popham, 252 Ga. 247, 312 S.E.2d 795 (1984). As to the possible need for more training for those involved is making zoning decisions, see Comment, A Proposal to Implement Mandatory Training Requirements for Home Rule Zoning Officials, 2008 Mich. St. L. Rev. 879.

will supposedly not "second-guess" the legislative body as to the *wisdom* of zoning ordinances, but will only determine whether, at least debatably, there is some reasonable connection with a police-power purpose and reasonable exercise of the power.

Zoning ordinances are most often passed by municipal legislative bodies in basically the same form as other ordinances are passed, and by the same procedures—with the addition of those steps above noted.[139] But some municipalities have provisions, in state statutes or home-rule charters, for popular enactment of legislation through the process known as "initiative." This usually entails a designated number of voters signing a petition in order to have a proposed measure placed on the ballot at some election; the measure then becomes law if approved by a majority, or some designated super-majority, of those voting on the question at that election. Related in nature is the process known as "referendum," under which legislation passed by the governing body is (through action of that body itself or by petition of the voters) submitted to the electorate for final approval or rejection.[140] Can these processes be used to pass or reject zoning ordinances? Traditionally, it has often been held that the initiative cannot be used to pass or amend zoning laws, frequently on the ground that a specific and *exclusive* method has been provided by statute or charter, or that requirements generally applied to zoning ordinances (such as hearing and notice) are not met when the initiative method is used.[141] But the California court has stated in general terms that there is no valid objection to zoning legislation being passed by the initiative process.[142] And several jurisdictions have now adopted what seems the "trend view": policy-setting zoning laws can be adopted by the initiative method, though specific, administrative-type decisions on particular land-uses cannot be made in this fashion.[143] This distinction is also often

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[139] See notes 131–133 *supra* and accompanying text. For a "model" set of administrative provisions for use in zoning ordinances, see American Society of Planning Officials, The Text of a Model Zoning Ordinance (3d ed. 1966).

[140] On initiative and referendum, see generally Chapter 27 *infra*.

[141] See Moon v. Smith, 138 Fla. 410, 189 So. 835 (1939); City Council of Augusta v. Irvin, 109 Ga.App. 598, 137 S.E.2d 82 (1964); Deans v. West, 189 Neb. 518, 203 N.W.2d 504 (1973); Williston Park v. Israel, 191 Misc. 6, 76 N.Y.S.2d 605 (1948), aff'd 276 App.Div. 968, 94 N.Y.S.2d 921, appeal denied 276 App.Div. 1013, 95 N.Y.S.2d 602, aff'd 301 N.Y. 713, 95 N.E.2d 208; State v. Town of Tumwater, 66 Wn.2d 33, 400 P.2d 789 (1965). Cf. Transamerica Title Ins. Co. v. City of Tucson, 157 Ariz. 346, 757 P.2d 1055 (1988) (initiative process cannot be used to amend city and county zoning ordinances so as to create "buffer zones" as this would violate due process and contravene provisions of state law delegating zoning powers to governing bodies of counties and cities); Whatcom County v. Brisbane, 125 Wn.2d 345, 884 P.2d 1326 (1994) (county's land planning ordinance not subject to referendum). See generally Comment, Land Use by, for, and of the People: Problems with the Application of Initiatives and Referenda to the Zoning Process, 19 Pepperdine L. Rev. 99 (1991). Compare Freilich & Guemmer, Removing Artificial Barriers to Public Participation in Land-Use Policy: Effective Zoning and Planning by Initiative and Referenda, 21 Urban Law. 511 (1989).

[142] Associated Home Builders v. City of Livermore, 18 Cal.3d 582, 135 Cal.Rptr. 41, 557 P.2d 473 (1976), noted 66 Cal.L.Rev. 373 (1978); Builders Association v. City of San Jose, 13 Cal.3d 225, 118 Cal.Rptr. 158, 529 P.2d 582 (1974) (initiative ordinance provided that land couldn't be rezoned for residential development within certain areas of city unless party seeking rezoning agreed to provide satisfactory alternative to permanent school construction); San Diego Building Contractors Association v. City Council, 13 Cal.3d 205, 118 Cal.Rptr. 146, 529 P.2d 570 (1974), appeal dism'd 427 U.S. 901, 96 S.Ct. 3184, 49 L.Ed.2d 1195 (initiative ordinance established a uniform height limitation for buildings erected along city's coastline in the future). Earlier California cases had tended to allow zoning measures to be originated by initiative where the initiative power was granted the city electors by the city's own home-rule charter, but not where the power was granted by the general state statutes on initiative. See Annot., Adoption of Zoning Ordinance or Amendment Thereto Through Initiative Process, 72 A.L.R.3d 991, § 8 (1976). See generally Aperin & King, Ballot Box Planning: Land Use Planning Through the Initiative Process in California, 21 Sw. U.L. Rev. 1 (1992); Hayes & Smith, Report of the Subcommittee on Zoning Process, 23 Urban Law. 855, 858–63 (1991).

[143] See Arnel Development Co. v. City of Costa Mesa, 28 Cal.3d 511, 169 Cal.Rptr. 904, 620 P.2d 565 (1980) (zoning, or rezoning, ordinance—but not administrative decisions—can be enacted by initiative); Redevelopment Agency v. City of Berkeley, 80 Cal.App.3d 158, 143 Cal.Rptr. 633 (Dist.Ct. 1978) (initiative

now employed in determining whether, assuming the general availability of the referendum method, a zoning measure may be submitted to the voters in a referendum.[144] (This is in accord with the legislative-v.-administrative distinction often drawn whenever questions arise of the availability of the initiative and referendum processes, as discussed in the chapter on extraordinary remedies *infra*.) The U.S. Supreme Court has found no federal Constitutional objection to the use of a popular referendum on zoning questions.[145]

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could not be used to amend city's development plan; administrative powers of redevelopment agency were involved); Storegard v. Board of Elections, 22 Ohio Misc. 5, 255 N.E.2d 880, 50 O.O.2d 228 (1969); Drockton v. Board of Elections, 16 Ohio Misc. 211, 240 N.E.2d 896 (1968); Russell v. Linton, 52 Ohio O. 228, 115 N.E.2d 429 (Com.Pl.1953). Cf. Meridian Development Co. v. Edison Township, 91 N.J.Super. 310, 220 A.2d 121 (1966) (with review of cases; voters could amend zoning ordinance by initiative and referendum); Allison v. Washington County, 24 Or.App. 571, 548 P.2d 188 (1976) (state constitution gave authority to legislate locally on zoning matters by initiative and referendum—a referendum was here involved). See generally Oren, The Initiative and Referendum's Use in Zoning, 64 Cal.L.Rev. 74 (1976); Annnot., Adoption of Zoning Ordinance, *supra* note 142.

[144] See Yost v. Thomas, 36 Cal.3d 561, 205 Cal.Rptr. 801, 685 P.2d 1152 (1984) (adoption of land-use plan for coastal zone was a legislative act and thus subject to referendum); Johnston v. City of Claremont, 49 Cal.2d 826, 323 P.2d 71 (1958); City of Coral Gables v. Carmichael, 256 So.2d 404 (Fla.App.1972), cert. dism'd per curiam 268 So.2d 1; Anne Arundel County v. McDonough, 277 Md. 271, 354 A.2d 788 (1976) (referendum available as to comprehensive zoning plan *if* a clear, understandable statement of the issues is presented); Denney v. City of Duluth, 295 Minn. 22, 202 N.W.2d 892 (1972) (amendments changing boundaries of districts entitled to as much dignity as original enactment, and are thus also subject to referendum provisions of city charter); Forman v. Eagle Thrifty Drugs & Markets, Inc., 89 Nev. 533, 516 P.2d 1234 (1973) (whether or not to embark on a zoning plan is a legislative question and proper subject for referendum, but changing of areas and granting of exceptions are administrative, and thus not subject to referendum); Hilltop Realty, Inc. v. City of South Euclid, 110 Ohio App. 535, 164 N.E.2d 180, 13 O.O.2d 348 (1960), appeal dismissed 170 Ohio St. 581, 11 O.O.2d 423, 166 N.E.2d 924, cert. denied sub nom. Crahan v. Ohio, 364 U.S. 842, 81 S.Ct. 82, 5 L.Ed.2d 66 (rezoning ordinance subject to referendum); State ex rel. Hunzicker v. Pulliam, 168 Okl. 632, 37 P.2d 417 (1934) (city ordinance extending zone for oil and gas drilling was legislative in nature and thus subject to referendum). Cf. West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974) (amendment changing zoning as to particular property not subject to referendum). On the procedure to be used and factors to be weighed in determining whether a zoning change is legislative in nature, and thus subject to referendum, or is administrative, and thus not so subject, see Citizen's Awareness Now v. Marakis, 873 P.2d 1117 (Utah 1994). But see Westgate Families v. County Clerk of Los Alamos County, 100 N.M. 146, 667 P.2d 453 (1983) (New Mexico Zoning Enabling Act, by expressly providing for zoning by representative bodies, denied exercise of this power by referendum regardless of legislative or administrative nature of the matter). The Nebraska court seemed to adopt the legislative-v.-administrative test in Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956), where it was held that a referendum could not be conducted as to a particular zoning change. But in Hoover v. Carpenter, 188 Neb. 405, 197 N.W.2d 11 (1972) (not a zoning case), the court disapproved of any such test and said that whether or not a referendum can be held as to a particular matter must depend on the governing statutory language as to referenda and the facts of each case. See generally Reber & Mika, Democratic Excess in the Use of Zoning Referenda, 29 Urban Law. 277 (1997) (arguing that mandatory zoning referenda are often unnecessary and thwart zoning legislation); Rosenberg, Referendum Zoning: Legal Doctrine and Practice, 53 U. Cinc. L. Rev. 381 (1984); Annot., Adoption of Zoning Ordinance or Amendment Thereto as Subject of Referendum, 72 A.L.R.3d 1030 (1976).

With little or no reliance on the legislative-v.-administrative test, some cases have found zoning ordinances subject to a referendum under the relevant state law. See Witkin Homes, Inc. v. City & County of Denver, 31 Colo.App. 410, 504 P.2d 1121 (1972) (under charter, city council could submit "any ordinance" to referendum); Reva v. Portage Township, 356 Mich. 381, 96 N.W.2d 778 (1959); State ex rel. Wahlmann v. Reim, 445 S.W.2d 336 (Mo.1969) (zoning enabling act did not prohibit referendum on comprehensive zoning ordinance).

[145] City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976) (due process of landowner applying for zoning change not violated though referendum required to ratify the change, and change had to be approved by 55% in the referendum). Cf. Arthur v. City of Toledo, 782 F.2d 565 (6th Cir.1986) (city referendum barring sewer extensions did not violate civil rights of public housing applicants). A referendum may even be validly required on the issue of locating low- or moderate-income housing projects in a municipality. See Annot., Referendum Relating to Low- or Moderate-Income Housing Projects as Constituting Racial Discrimination in Violation of Federal Constitution, 15 A.L.R.Fed. 613 (1973). Of course, legal requirements for the referendum must, as in all cases, be strictly obeyed. See In re Referendum

Attempts are occasionally made to "condition" a particular zoning classification—one desired by the property-owner(s), as by the executing of a restrictive covenant limiting further uses of the land. This is known as "contract" or "conditional" zoning[146] and has usually been struck down as violative of equal protection, or of rules against "contracting away" governmental authority, or of other constitutional provisions.[147] But this is subject to an exception: Requirements that a propertyowner (often a subdivider) must, in order to take advantage of new zoning classifications, dedicate some of his property for public uses (streets, parks, etc.) have been upheld if they are equally and fairly applied.[148]

Petitions of City of Norman, 155 P.3d 841 (Okla. Civ. App. 2006) (referendum petition as to rezoning ordinances held invalid for failure to include exact copies of the rezoning ordinances). See generally Chapter 27 *infra*.

[146] A distinction is sometimes drawn between these terms, with "contract zoning" then used to cover the situation in which the property owner provides consideration to the local governing body (usually in the form of a promise to do or not do certain things) in return for requested rezoning or an enforceable promise of such rezoning. "Conditional zoning" is then used to indicate situations in which zoning legislation is passed on condition that a landowner perform a certain act prior to, simultaneous with, or after passage of the ordinance. In the latter cases, there is no promise enforceable against the landowner, but passage or effectiveness of the legislation is conditioned on the landowner's act. See Annot., Validity, Construction, and Effect of Agreement to Rezone, or Amendment to Zoning Ordinance, Creating Special Restrictions or Conditions Not Applicable to Other Property Similarly Zoned, 70 A.L.R.3d 125, 131 (1976). On the possible validity of "conditional zoning" even in a jurisdiction where "contract zoning" is invalid, see Ellickson & Tarlock, Land-Use Controls 245–50 (1981); Wright & Gitelman, Land Use in a Nutshell 189–90 (4th ed. 2000) (finding the attempt to distinguish conditional zoning from contract zoning "obviously tenuous"; *id.* at 190). See generally Note, Contract and Conditional Zoning: A Tool for Zoning Flexibility, 23 Hastings L.J. 825 (1972). See also Trager, Contract Zoning, 23 Md.L.Rev. 121 (1963); Comment, The Use and Abuse of Contract Zoning, 12 U.C.L.A.L.Rev. 897 (1965).

[147] See Haas v. City of Mobile, 289 Ala. 16, 265 So.2d 564 (1972); Bartsch v. Planning & Zoning Comm'n, 6 Conn.App. 686, 506 A.2d 1093 (1986) (zoning commission's attempt to condition a rezoning on the filing of a restrictive covenant limiting use of premises to a medical office building and requiring the creation of a green-belt buffer area invalidated as violating statutory requirements of uniformity); Hartnett v. Austin, 93 So.2d 86 (Fla.1956); Cederberg v. City of Rockford, 8 Ill.App.3d 984, 291 N.E.2d 249 (1972) (promise to execute restrictive covenant); Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959); Houston Petroleum Co. v. Automotive Products Credit Association, 9 N.J. 122, 87 A.2d 319 (1952). Cf. Board of County Comm'rs v. H. Manny Holtz, Inc., 65 Md.App. 574, 501 A.2d 489 (1985) (statute interpreted as not authorizing "conditional use zoning"). But Washington State allows such zoning subject, by and large, to the same restrictions that apply to other zoning. See State ex rel. Myhre v. City of Spokane, 70 Wn.2d 207, 422 P.2d 790 (1967) (agreement with private person valid if zoning agreed to is reasonable and not solely for benefit of private persons). Cf. Di Salle v. Giggal, 128 Colo. 208, 261 P.2d 499 (1953) (defendant-developer had agreed to comply with population-density restrictions at termination of war-emergency situation, could not repudiate agreement); Bucholz v. City of Omaha, 174 Neb. 862, 120 N.W.2d 270 (1963) (rezoning to permit shopping center valid even though property-owner, at direction of council, executed and recorded protective covenant agreement requiring that property be developed in accord with plan presented to council in support of the rezoning, and even though agreement was approved by council and was an inducement for the rezoning). See generally Shapiro, The Case for Conditional Zoning, 41 Temple L.Q. 267 (1968); Contract and Conditional Zoning Without Romance: A Public Choice Analysis, 81 Fordham L. Rev. 1923 (2013).

On the relationship between zoning ordinances and restrictive covenants, see generally Berger, Conflicts Between Zoning Ordinances and Restrictive Covenants: A Problem in Land Use Policy, 43 Neb.L.Rev. 449 (1964) (noting that most courts simply conclude that the restrictive covenant is not abrogated or affected by the zoning ordinance). See also Comment, The Effect of Private Restrictive Covenants on the Exercise of the Public Powers of Zoning and Eminent Domain, 1963 Wis.L.Rev. 321. On the effect that changed conditions in an area may have on restrictive covenants, see Note, Real Property—Restrictive Covenants—Effect of Change in Neighborhood on Enforceability, 44 Or. L. Rev. 157 (1964); Annot., Change of Neighborhood as Affecting Restrictive Covenants Precluding Use of Land for Multiple Dwelling, 53 A.L.R.3d 492 (1973).

[148] See Haas v. City of Mobile, *supra* note 147; Funger v. Mayor & Council of Somerset, 249 Md. 311, 239 A.2d 748 (1968); City of Greenbelt v. Bresler, 248 Md. 210, 236 A.2d 1 (1967) (city agreed to recommend rezoning to county, in return for developer's promise to limit density and to donate park to city); State ex rel. Zupancic v. Schimenz, 46 Wis.2d 22, 174 N.W.2d 533 (1970) (with review of cases). But cf. Pressman v. City of Baltimore, 222 Md. 330, 160 A.2d 379 (1960) (planning commission found to have no authority to impose conditions).

§ 18.7 Zoning—Amendments

Amendments to zoning ordinances can be proposed by the municipal governing body itself, by the municipal planning board (where there is one), or by petition of affected property owners.[149] Amendments may involve changes in the zone applied to a particular parcel of land (often called "rezoning" or "reclassification") or zoning-text amendments: a change in the language as to what is allowed within a particular zone. In either case, the same requirements, such as hearing and notice, will ordinarily apply to amendments as apply to initial adoption of zoning laws;[150] in most jurisdictions, the same presumption of reasonableness attaches once the amendment is adopted;[151] and the "fairly debatable"

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[149] See Shellburne, Inc. v. Roberts, 43 Del.Ch. 276, 224 A.2d 250 (1966); Pitman v. City of Medford, 312 Mass. 618, 45 N.E.2d 973 (1942). Amendments that reduce the permitted uses of a piece of property or reduce the permitted intensity of use are often referred to as "downzoning." See Tiffany, Downzoning—What Does it Mean?. 25 Ariz. Attorney, No. 7, at 19 (March, 1989).

[150] See Holly Development, Inc. v. Board of County Comm'rs, 140 Colo. 95, 342 P.2d 1032 (1959) (notice must be intelligible to average citizen to be effective); Board of County Comm'rs v. McNally, 168 Neb. 23, 95 N.W.2d 153 (1959) (notice requirements must be rigidly followed for rezoning to be valid); Bruno v. Borough of Shrewsbury, 2 N.J.Super. 550, 65 A.2d 131 (1949) (purpose of notice requirement is to allow parties and citizens to present their views on the matter); Kelly v. City of Philadelphia, 382 Pa. 459, 115 A.2d 238 (1955). Cf. Commerce Oil Refining Corp. v. Miner, 170 F.Supp. 396 (D.R.I.1959), cert. denied 364 U.S. 910, 81 S.Ct. 274, 5 L.Ed.2d 225 (original zoning ordinance invalid for lack of proper notice on hearing; amendment was therefore also invalid); National Transportation Co. v. Toquet, 123 Conn. 468, 196 A. 344 (1937) (change in zoning invalid where notice of hearing on change not given in compliance with statute requiring 15 days' notice). But see Saadi, Neighbor Opposition to Zoning Change, 49 Urban Law. 393 (2017), arguing that neighbor opposition to zoning changes is too often a factor in local decision-making.

As with notice required as to original zoning, notices of amendments and/or of meetings concerning proposed amendments will suffice if they show substantial compliance with any statutory or charter requirements and give a reasonably clear indication of the contemplated action. See Ciaffone v. Community Shopping Corp., 195 Va. 41, 77 S.E.2d 817 (1953). And notice of a hearing on a proposed amendment does not become invalid because the wording of the amendment, as stated in the notice, is changed as a result of the meeting itself. Neuger v. Zoning Board, 145 Conn. 625, 145 A.2d 738 (1958).

On the degree of compliance with statutory or charter requirements that is required for zoning amendments, see generally State v. Payne, 131 Conn. 647, 41 A.2d 908 (1945); Howell v. Liebowitz, 116 N.Y.S.2d 537 (1952); Brachfeld v. Sforza, 114 N.Y.S.2d 722 (1952), all indicating that rather strict compliance is needed.

In some jurisdictions, there are provisions that if a designated percentage of the landowners within (or within a certain distance of) an affected area protest a proposed amendment to a zoning law, the law can only be passed by some designated super-majority vote of the local governing body. Such provisions have almost universally been held valid. See Annot., Zoning: Validity and Construction of Provisions of Zoning Statute or Ordinance Regarding Protest by Neighboring Property Owners, 7 A.L.R.4th 732 (1981).

[151] See Ruben v. City of Pittsburgh, 142 F.Supp. 787 (W.D.Pa.1956); Wolfpit-Villa Crest Association, Inc. v. Zoning Comm'n of Norwalk, 144 Conn. 560, 135 A.2d 732 (1957); Kinney v. City of Joliet, 411 Ill. 289, 103 N.E.2d 473 (1952); Cohen v. City of Lynn, 333 Mass. 699, 132 N.E.2d 664 (1956) (not necessary to find change in locus to support change in zoning); Miller v. Kansas City, 358 S.W.2d 100 (Mo.App. 1962); Moody v. City of University Park, 278 S.W.2d 912 (Tex.Civ.App.1955), ref'd n.r.e. But the "Maryland Rule" is that amendments to zoning ordinances will *only* be sustained if it is shown that the original zoning was mistaken or that there have been changed circumstances. Board of County Commissioners v. Turf Valley Associates, 247 Md. 556, 233 A.2d 753 (1967); Zinn v. Board of Zoning Appeals, 207 Md. 355, 114 A.2d 614 (1955). This rule is criticized in Hirokawa, Making Sense of a "Misunderstanding of the Planning Process": Examining the Relationship Between Zoning and Rezoning Under the Change-or-Mistake Rule, 44 Urban Law. 295 (2012). Oregon has sometimes shown a willingness to go along with this rule. See Cunningham v. City of Brookings, 11 Or.App. 579, 504 P.2d 760 (1972); Roseta v. County of Washington, 254 Or. 161, 458 P.2d 405 (1969). Cf. the Oregon cases cited in next paragraph of this footnote. As has Mississippi. Moore v. Madison County Board of Supervisors, 227 So.2d 862 (Miss. 1969). New Mexico follows a similar rule. See Davis v. City of Albuquerque, 98 N.M. 319, 648 P.2d 777 (1982) (before a zoning ordinance can be validly amended, the municipality must show either a mistake in the original zoning or a substantial change in the character of the area). But cf. Albuquerque Commons Partnership v. City Council of Albuquerque, 144 N.M. 99, 184 P.3d 411 (2008) ("change or mistake" rule ordinarily requires that proponent of a piecemeal zoning change show that the change is justified by a change in conditions in the community or a mistake in the original zoning, but municipality may also be able to justify an amendment that downzones a particular property by showing that the change is

rule—that the ordinance will be treated as reasonable and otherwise valid wherever the matter is at least fairly debatable—will be applied in judicial challenges of the zoning.[152] But it has been observed both by courts and writers that there is considerable tendency of the courts to apply mere lip service to the presumptions of validity where amendments in the original law are concerned; after all, if the original law is presumed to have been reasonable and otherwise valid, can the same presumption logically apply once that law is changed?[153]

§ 18.8 Building Codes

Building codes—and such specific sets of laws as fire codes, electrical codes, health codes, etc.—are often enacted by municipalities under their police power from the state. Building codes are designed to ensure safe construction, adequate means of handling possible disasters, and a reasonably healthful environment. A specific type of such a code is a housing code, designed to assure fitness of housing for human occupancy, and often containing standards for particular buildings such as limits on number of occupants and requirements as to services and maintenance. In general, many of the same standards of reasonableness and rules of procedure apply to such codes as apply to zoning laws. Three important differences may be noted: (1) As new methods and materials are

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advantageous to the community, as articulated in the city's comprehensive or master plan). Washington State has usually required a change in circumstances to justify an amendment. See Woods v. Kittitas County, 162 Wash.2d 597, 174 P.3d 25 (2007) (proposed rezoning is not presumed valid, can be justified only by a showing of a change of circumstances since the original zoning, and must have a substantial relationship to public health, safety, morals, or general welfare). And occasional authorities in other states apply this rule. See Zygmont v. Planning & Zoning Commission, 152 Conn. 550, 210 A.2d 172 (1965) (*ordinarily* a change of zone must be justified by some new condition, changing the character of the area). Cf. Miller v. Kansas City, *supra* (original business district extended; amendment held reasonable, court saying a change in conditions is not *always* necessary to justify change in zone). On Connecticut law, see generally Andrew C. Petersen, Inc. v. Town of Bloomfield, 154 Conn. 638, 228 A.2d 126 (1967), saying a change of zone may occasionally be allowed without proof of changed conditions.

In a notable 1973 decision concerning a zoning change, Oregon announced a new rule of review: legislative land-use actions, which establish general policies, will be overturned only if capricious or arbitrary action is shown; but quasi-judicial decisions, involving application of policies to particular property, will be more strictly scrutinized. Fasano v. Board of County Commissioners, 264 Or. 574, 507 P.2d 23 (1973). See, applying the distinctions, South of Sunnyside Neighborhood League v. Board of Commissioners, 280 Or. 3, 569 P.2d 1063 (1977) (zone changes affected large areas; held legislative).

[152] See Trust Co. v. City of Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951); Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N.W. 707 (1930); McNair v. Oklahoma City, 490 P.2d 1364 (Okl.1971); Kenny v. Kelly, 254 S.W.2d 535 (Tex.Civ.App.1953). Cf. Garrett v. Oklahoma City, 594 P.2d 764 (Okl.1979) (decision *not* to rezone judged by "fairly debatable" rule). See generally, listing factors to weigh in determining the validity of zoning amendments, Garner v. City of Carmi, 28 Ill.2d 560, 192 N.E.2d 816 (1963). An amendment may be invalidated as unreasonable if it unduly depreciates the value of nearby properties. Clifton Hills Realty Co. v. City of Cincinnati, 60 Ohio App. 443, 21 N.E.2d 993 (1938), noted 38 Mich.L.Rev. 431 (1940). And an amendment is invalid if made only to accommodate certain private interests. Page v. City of Portland, 178 Or. 632, 165 P.2d 280 (1946) (saying power to amend exists where there has been a substantial change of conditions and the amendment furthers the public interest).

[153] See American Smelting & Refining Co. v. City of Chicago, 347 Ill.App. 32, 105 N.E.2d 803 (1952) (amendments will be carefully examined by court, especially if no change in the area is shown and if classification is changed after a purchase in reliance on the former zoning); City of Baltimore v. National Association for Advancement of Colored People, 221 Md. 329, 157 A.2d 433 (1960) (is presumption amendment reasonable, but this faces the counter-presumption that original zoning was reasonable); D'Angelo v. Knights of Columbus Building Association, 89 R.I. 76, 151 A.2d 495 (1959) (presumption of amendment's reasonableness has no application when evidence of arbitrary "spot zoning" is introduced). Cf. Roseta v. County of Washington, *supra* note 151 (usual presumption of legislative regularity doesn't apply to amendments). See generally 1A Antieau, Municipal Corporation Law § 7.159, at 7–259 (1998). See also Appleman, Can Florida's Legislative Standard of Review for Small-scale Land Use Amendments Be Justified?, 24 U.C.L.A.J. Envtl. L. & Pol'y 305 (2005–06).

regularly developed within the building trades, there is a special need for flexibility, and/or fairly frequent changes, in building codes.[154] (2) There is generally no right to a nonconforming use under building and housing codes. Such laws can constitutionally be made applicable to existing structures, and often are.[155] (3) There are special problems

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[154] See Thompson, The Problem of Building Code Improvement, 12 Law & Contemp. Prob. 95 (1947). See generally Kelly, Fair Housing, Good Housing or Expensive Housing? Are Building Codes Part of the Problem or Part of the Solution?, 29 John Marshall L. Rev. 349 (1996); Comment, Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply, 31 U.Chi.L.Rev. 180 (1963), urging that building codes not be made too strict. See also Valletta, Regulation of Building Materials and Appliances in New York City, 18 Urban Law. 209 (1986). On the effects of federal legislation mandating design standards for many structures so as to allow access to disabled persons, see Andersen, Architectural Barriers Legislation and the Range of Human Ability: Of Civil Rights, Missed Opportunities, and Building Codes, 28 Willamette L. Rev. 525 (1992). On the history of building codes and the effects that certain tragic events have had on the creation of them, see Stein, Doomed to Re-repeat History: The Triangle Fire, the World Trade Center Attack, and the Importance of Strong Building Codes, 21 St. John's J. Legal Comment. 767 (2007), reviewing Von Drehle, Triangle: The Fire that Changed America (2003), and Dwyer & Flynn, 102 Minutes: The Untold Story of the Fight to Survive Inside the Twin Towers (2005).

As to the effect that "green movements" have had on building codes, see Hirokawa, At Home With Nature: Early Reflections on Green Building Laws and the Transformation of the Built Environment, 39 Envtl. L. 507 (2009); Schindler, Following Industry's LEED ®: Municipal Adoption of Private Green Building Standards, 62 Fla. L. Rev. 285 (2010). See generally Abair, Green Buildings: What It Means to Be "Green" and the Evolution of Green Building Laws, 40 Urban Law. 623 (2008). See also Circo, Will Green Building Contracts Transform Construction and Design Law?, 43 Urban Law. 483 (2011).

As to the possibility of federal pre-emption of local "green building" laws, see Hupp, Recent Trend in Green Buildings Laws: Potential Preemption of Green Buildings and Whether Retrofitting Existing Buildings Will Reduce Greenhouse Gases and Save the Economy, 41 Urban Law. 489 (2009).

As to the problems attending the most common form of "green zoning"—the incorporation of privately generated standards into public law—, see Wolf, A Yellow Light for "Green Zoning": Some Words of Caution About Incorporating Green Building Standards into Local Land Use Law, 43 Urban Law. 949 (2011), discussing how the highly popular LEED (Leadership in Energy and Environmental Design) ratings systems have been a major force in the "green" movement. See generally Schindler, *supra*. As to the desirability of such ratings systems, compare Note, LEED Locally: How Local Governments Can Effectively Mandate Green Building Standards, 2013 U. Ill. L. Rev. 1211, with Note, LEEDing in the Wrong Direction: Addressing Concerns With Today's Green Building Policy, 85 S. Cal. L. Rev. 1377 (2012). See also Comment, Incorporating Third Party Green Building Rating Systems Into Municipal Building and Zoning Codes, 31 Pace Envtl. L. Rev. 832 (2014); Note, Legal Impediments to Sustainable Architecture and Green Building Design, 14 Vt. J. Envtl. L. 611 (2013); Howe & Gerrard (eds.), The Law of Green Buildings: Regulatory and Legal Issues in Design, Construction, Operations, and Financing (American Bar Assn. Section of Environment, Energy & Resources 2012); Kahn, Green Cities—Urban Growth and the Environment (Brookings Institution Press 2006).

As to the need to have building laws that will help prevent damages in disasters, see Althaus and Hernandez, Geography and Building Codes Play Important Roles, Wall St. J., Sept. 21, 2017, A 8 (Mexico City's building codes were greatly strengthened after the city's 1985 earthquake); Baldridge, Disaster Resilience: A Study of San Francisco's Soft-Story Building Problem, 44 Urban Law. 465 (2012). (Soft-story residential buildings are defined as "multi-story, wood-frame structures with inadequately braced lower stories." *Id.* at 466, note 10). Many current building codes may be inadequate in disaster situations. See *id.* at 470. See also Comment, Green Efficiency at Its Finest: Shifting the Building Permit Process to Promote Sustainable Buildings, 48 U. San. Francisco L. Rev. 533 (2014).

[155] Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 66 S.Ct. 850, 90 L.Ed. 1096 (1946), upheld the constitutionality of the retroactive application of a sprinkler-system requirement—*i.e.*, application to structures existing before the code was passed. See Fordham & Upson, Constitutional Status of Housing Codes 54 (National Ass'n of Housing & Redevelopment Officials 1961). Cf. Third & Catalina Associates v. City of Phoenix, 182 Ariz. 203, 895 P.2d 115 (Ariz.App. 1994) (ordinance that required retrofitting of commercial high-rise buildings with sprinkler systems held not an unconstitutional "taking" without compensation); Building Industry Ass'n v. City of Livermore, 45 Cal.App.4th 719, 52 Cal.Rptr.2d 902 (1996) (statute upheld authorizing municipality to require sprinkler systems in all new or substantially remodeled construction). Sometimes courts have been unwilling—because of defendant's good faith, the effect of changed conditions, etc.—to order a builder to *remove* a structure built in violation of building codes; but even this extreme relief has probably been granted in a majority of the cases where sought and where less extreme relief was not possible. See Van Hecke, Injunctions to Remove or Remodel Structures Erected in Violation of Restrictions, 32 Tex.L.Rev. 521 (1954). Of course, building code provisions, like zoning laws, may be struck down if the requirements bear no reasonable relationship to a police-power purpose. See Safer v. City of Jacksonville, 237 So.2d 8 (Fla.App.1970);

in enforcement of building and housing codes, since violations often cannot be detected without close inspection of the premises. It has been held that local authorities may obtain warrants for searches of premises if they have probable cause to suspect violations in the general area, even if they lack specific knowledge of the condition of the particular building.[156]

§ 18.9 Special Relief from Zoning: Exceptions, Variances, Conditional Use Permits

Earlier sections of this chapter have indicated some ways in which a property owner may escape the normal effect of zoning ordinances: The owner may be able to establish that he has a nonconforming use—a use ordinarily not permitted by the ordinance but allowed as to his property because the use was lawfully in existence when the ordinance took effect. Or the owner may be able to have the local legislative body amend the zoning ordinance—as, for instance, by reclassifying his property, or by redefining the uses allowed in his zone. Or the owner may be able to show that the zoning as applied to his property would amount to an unconstitutional "taking"—as where the owner can show he is left with no possible, or at least no reasonable, uses under the law. But what if the owner's situation is not so extreme as to show a taking, and the owner does not qualify as having a nonconforming use, and lacks the political clout or other ability to get an amendment passed—is all hope gone? Not necessarily; the owner might consider the possibilities of three kinds of special relief that may be available; the exception; the variance; and the special (or conditional) use permit.

As so often in the law, these terms are not always used precisely—and are sometimes used as if they were interchangeable, even though each really has a distinct meaning of its own. As accurately used, "exception" means a deviation from the generally permitted zoning that is specifically provided by the legislative body when the zoning law is enacted.[157] Thus, the law may specify that no non-residential uses are allowed, or

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Kaukas v. City of Chicago, 27 Ill.2d 197, 188 N.E.2d 700 (1963), appeal dism'd 375 U.S. 8, 84 S.Ct. 67, 11 L.Ed.2d 40 (is for court to decide whether challenged provisions bear reasonable relationship to public welfare); Gates Co. v. Housing Appeals Board of City of Columbus, 10 Ohio St.2d 48, 225 N.E.2d 222 (1967).

[156] See Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Cf. Community Renewal Foundation, Inc. v. Chicago Title & Trust Co., 44 Ill.2d 284, 255 N.E.2d 908 (1970), upholding a statute allowing the court to appoint a receiver to cause structures to conform to city ordinances, with power in the receiver to create a lien on real estate, etc. Building codes sometimes provide that if a building owner fails to make ordered improvements within a certain length of time, the municipality may contract for the repairs and assess the cost, plus a municipal service charge, against the owner. See Vande Bunte v. City of Lansing, 140 Mich.App. 60, 362 N.W.2d 889 (1985), ruling that such an assessment is not a property tax but an exercise of the city's police power. See generally Gribtz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum.L.Rev. 1254 (1966). See also Howe, Code Enforcement in Three Cities: An Organizational Analysis, 13 Urban Law. 65 (1981).

In extreme cases, courts can even issue orders to vacate or to demolish buildings not conforming to building codes; but the structures must present a grave and imminent danger to the public—and usually will, where such means are justified, be nuisances. See City of Chicago v. Busch, 132 Ill.App.2d 486, 270 N.E.2d 249 (1971) (destruction not proven necessary); City of Danville v. Hartley, 101 Ill.App.2d 31, 241 N.E.2d 460 (1968); City of Pittsburgh v. Kronzek, 2 Pa.Cmwlth. 660, 280 A.2d 488 (1971) (demolition order upheld).

[157] See Piscitelli v. Township of Scotch Plains, 103 N.J.Super. 589, 248 A.2d 274 (1968). Unlike variances, exceptions can be allowed without any showing of undue hardship. See Mitchell Land Co. v. Planning & Zoning Board, 140 Conn. 527, 102 A.2d 316 (1953); Moriarty v. Pozner, 21 N.J. 199, 121 A.2d 527 (1956); Application of Devereux Foundation, 351 Pa. 478, 41 A.2d 744 (1945), appeal dism'd 326 U.S. 686, 66 S.Ct. 89, 90 L.Ed. 403. But an occasional authority treats exceptions and variances the same, and requires undue hardship for even an exception to be justified. See Marino v. City of Baltimore, 215 Md. 206, 137 A.2d 198 (1957). On all the forms of exceptional relief from zoning laws, see generally Dallstream & Hunt, Variances, Exceptions and Conditional Use Permits in California, 5 U.C.L.A.L.Rev. 179 (1958).

that only residential uses are allowed, *except* . . . (certain designated uses—for instance, hospitals or schools). Once the owner establishes that he is within the terms of such an exception, the owner is usually considered to be entitled to the exceptional use as a matter of right.[158] But two qualifications on this "right" sometimes exist—and may help account for the fact that the "exception" so often becomes confused with the variance and with the special use permit: (1) Since factual questions, and questions of interpretation may exist, as to whether or not a proposed use actually comes within an exception, a property owner does often have to apply to the local zoning board or other administrative body to establish his right to the exception.[159] Adequate standards must be provided the administrative body—standards that are reasonably definite and certain—in order for it to be able validly to grant and deny the exceptions.[160] Often, statutes or zoning laws provide that notice must be given nearby property owners—as by posting in the neighborhood, or through newspaper publication—and that such neighbors must be given an opportunity to be heard if they desire it; any such provisions are normally mandatory.[161] (2) Conditions may be imposed, as on the method of operation of the specially permitted used, by the ordinance that authorizes the exception.[162] Again, it is the zoning commission or a comparable administrative body that will decide whether the conditions are met; but the commission has no authority to impose additional conditions of its own unless, as is sometimes the case, this is clearly allowed by state statute or the local zoning ordinances.[163]

A variance is a special relaxing of the rules as to particular property because of the unusual nature of that property—an administratively granted dispensation because the

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[158] Graves v. Bloomfield Planning Board, 97 N.J.Super. 306, 235 A.2d 51 (1967) (no undue hardship need be shown; exception, like rest of zoning ordinance, will be upheld if reasonable). Exceptions exist only where clearly provided by legislation. See Bellings v. Township of Denville, 96 N.J.Super. 351, 233 A.2d 73 (1967). But since zoning is in derogation of rights of private property, some authorities urge a liberal construction of exceptions. See Application of Rea Construction Co., 272 N.C. 715, 158 S.E.2d 887 (1968). "Exceptions" are also sometimes called "special exceptions" or "exemptions."

[159] Miklus v. Zoning Board of Appeals, 154 Conn. 399, 225 A.2d 637 (1967) (exceptions could be granted by local boards for hospitals in residential areas). See generally Annot., Construction and Application of Provisions for Variations in Application of Zoning Regulations and Special Exceptions Thereto, 168 A.L.R. 13 (1947).

[160] See Jackson v. Guilford County Board of Adjustment, 275 N.C. 155, 166 S.E.2d 78 (1969) (ordinance providing that exception could be granted if it would not adversely affect the public interest was void as too indefinite); Lauder v. Westerly, 101 R.I. 623, 226 A.2d 135 (1967); Williams Estates Inc. v. Zoning Board of Review, 94 R.I. 490, 182 A.2d 314 (1962) (sustaining ordinance); Lund v. City of Tumwater, 2 Wash.App. 750, 472 P.2d 550 (1970), review denied 78 Wash.2d 995 (1970). Cf. O'Boyle v. Coe, 155 F.Supp. 581 (D.D.C. 1957) (noting findings that must be made before gasoline station could be allowed in commercial zone of District of Columbia); In re Long Island Lighting Co. v. Horn, 49 Misc.2d 717, 268 N.Y.S.2d 366 (1964), aff'd 24 A.D.2d 840, 263 N.Y.S.2d 696 (1965) (setting forth standards listed in a New York ordinance on exceptions); Appeal of Moreland, 497 P.2d 1287 (Okl.1972) (ordinance found not to delegate legislative power to board of adjustment). See generally Annot., Attack on Validity of Zoning Statute, Ordinance, or Regulation on Ground of Improper Delegation of Authority to Board or Officer, 58 A.L.R.2d 1083 (1958).

[161] See Maher v. Town Planning & Zoning Commission, 154 Conn. 420, 226 A.2d 397 (1967) (requirements of posting in neighborhood).

[162] Montgomery County v. Mossburg, 228 Md. 555, 180 A.2d 851 (1962) (conditions imposed must be reasonable). See Creative Country Day School v. Montgomery County Board of Appeals, 242 Md. 552, 219 A.2d 789 (1966) (if conditions authorized by law and are reasonable, exception will be denied until they are met); Borough of North Plainfield v. Perone, 54 N.J.Super. 1, 148 A.2d 50 (1959). Cf. Tarver v. City of Sheridan Bd. of Adjustments, 327 P.3d 76 (Wyo. 2014) (board of adjustment had power to impose parking restrictions on bed and breakfast as condition of granting "special exemption").

[163] Beckish v. Planning & Zoning Commission, 162 Conn. 11, 291 A.2d 208 (1971) (conditions must be found in the zoning regulations or laws); Parish of St. Andrew's Protestant Episcopal Church v. Zoning Board of Appeals, 155 Conn. 350, 232 A.2d 916 (1967). But cf. Borough of North Plainfield v. Perone, 54 N.J.Super. 1, 148 A.2d 50 (1959) (inherent power found in zoning board to limit grant of exception).

burden on the particular property would otherwise be disproportionate to any public benefit.[164] Unlike the situation with exceptions, the obtaining of a variance is not a matter of right.[165] Since the awarding of the variance requires that the specific property have some unique characteristics, this is not an appropriate remedy where the zoning creates hardships as to all owners in an area—the appropriate relief in the latter case would be a legislatively enacted amendment to the zoning law.[166] Under statutes, charters, or zoning ordinances themselves, there is usually some provision for the granting of variances, and usually the task of deciding on these is given the zoning or planning commission, or some special board of zoning "appeals" or "adjustments"; such a grant does not carry with it the authority to change boundaries of zones, as that is a legislative task that must be left with the local governing body.[167] Reasonably definite

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[164] Arcadia Development Corp. v. City of Bloomington, 267 Minn. 221, 125 N.W.2d 846 (1964); Rosedale-Skinker Improvement Association v. Board of Adjustment, 425 S.W.2d 929 (Mo.1968); Moriarty v. Pozner, 21 N.J. 199, 121 A.2d 527 (1956). The granting of a variance does not constitute invalid "spot zoning" since the latter involves an *arbitrary* zoning of a small area, while variances should only be granted for good reason. See Life of the Land, Inc. v. City Council, 61 Hawaii 390, 606 P.2d 866 (1980) (approval of variance was non-legislative act and did not here single-out a particular parcel for a use inconsistent with comprehensive zoning plan). On spot zoning, see generally ns. 16–19, section 118 and accompanying text. On variances and similar devices, see generally Arnebergh, Variances in Zoning, 24 U.Kan.City L.Rev. 240 (1956); Note, Variance Law in New York: An Examination and Proposal, 44 Albany L.Rev. 781 (1980); Note, Zoning Variances, 74 Harv.L.Rev. 1396 (1961); Note, "Use" Variances: An Attempt to Eliminate Confusion, 17 Rutgers L.Rev. 789 (1963); Annot., Construction and Application of Provisions for Variations in Application of Zoning Regulations and Special Exceptions Thereto, *supra* note 159; Annot., Attack Upon Validity of Zoning Statute or Ordinance as Affected by Provisions for Variations, Permits, etc., 136 A.L.R. 1378 (1942).

Variances are also sometimes called "variations."

[165] See Surfrider Foundation v. Zoning Board of Appeals, 358 P.3d 664 (Hawaii 2015) (alleged need for variance was due to general conditions in neighborhood; no variance granted); Poster Advertising Co. v. Zoning Board, 408 Pa. 248, 182 A.2d 521 (1962); Magrann v. Zoning Board, 404 Pa. 198, 170 A.2d 553 (1961) (applicant for variance must show substantial and compelling reasons); Richman v. Philadelphia Zoning Board, 391 Pa. 254, 137 A.2d 280 (1958) (evidence of grants of similar variances in similar zones establishes no right in applicant and is irrelevant to his case); Pistachio v. Zoning Board of Review, 88 R.I. 285, 147 A.2d 461 (1959) (one seeking variance has burden of showing it would not be contrary to public interest and that literal enforcement of law would cause him unnecessary hardship). Cf. Bartlett v. City of Corpus Christi, 359 S.W.2d 122 (Tex.Civ.App.1962), distinguishing exceptions and variances.

But once a variance is granted, it is not merely personal to the then-owner, but becomes a right that passes with the land to any new owner(s). See State ex rel. Parker v. Konopka, 119 Ohio App. 513, 200 N.E.2d 695 (1963) (with review of cases); Nuckles v. Allen, 250 S.C. 123, 156 S.E.2d 633 (1967) (if person purchases property in reliance on variance that has previously been granted, he acquires a vested property right). Cf. Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N.W. 707 (1930) (local government estopped to revoke variance where property owner has made a substantial change of position in reliance thereon); Jones v. Zoning Board of Pittsburgh, 423 Pa. 416, 224 A.2d 205 (1966) (same). But in New Jersey, a new owner is not necessarily entitled to a variance granted a prior owner. See Smith v. Paquin, 77 N.J.Super. 138, 185 A.2d 673 (1962); Ardolino v. Board of Adjustment, Florham Park, 24 N.J. 94, 130 A.2d 847 (1957).

[166] State ex rel. Killeen Realty Co. v. City of East Cleveland, 108 Ohio App. 99, 153 N.E.2d 177 (1958), aff'd 169 Ohio St. 375, 160 N.E.2d 1. See Jasy Corp. v. Board of Adjustment, 413 Pa. 563, 198 A.2d 854 (1964) (if parcel not unique but is disadvantaged equally with rest of area, variance improper). But cf. Ench v. Mayor & Council of Pequannock Township, 47 N.J. 535, 222 A.2d 1 (1966), indicating either an amendment or a variance might be appropriate where local government wishes to allow a use formerly forbidden; but a mere resolution cannot be used. As to amendments, see generally § 18.7 *supra*.

[167] See Bray v. Beyer, 292 Ky. 162, 166 S.W.2d 290 (1942); Sugar v. North Baltimore Methodist Protestant Church, 164 Md. 487, 165 A. 703 (1933); Farah v. Sachs, 10 Mich.App. 198, 157 N.W.2d 9 (1968) (board may not, in guise of granting variance, amend or disregard zoning ordinance); Staller v. Cranston Zoning Board, 100 R.I. 340, 215 A.2d 418 (1965); Allan v. Zoning Board of Review, 79 R.I. 413, 89 A.2d 364 (1952); Driskell v. Board of Adjustment, 195 S.W.2d 594 (Tex.Civ.App. 1946) ref'd n. r. e. (zoning board of adjustment cannot be given power to create zoning districts; that power must be exercised by city authorities). Cf. Board of Adjustment v. Stovall, 218 S.W.2d 286 (Tex.Civ. App.1949) (ordinance which attempts to confer legislative functions on board of adjustment would be invalid delegation of legislative powers). But cf. Bradley v. Board of Zoning Adjustment, 255 Mass. 160, 150 N.E. 892 (1926) (statute conferring on board of zoning adjustment the power to change boundaries does not delegate legislative power in violation of constitution).

and certain standards must be legislatively established—by statute, charter, or ordinance—for the administrative body to apply in granting and denying variances; otherwise, the body's actions are invalid because of the unconstitutional delegation of legislative authority.[168] The basic test laid down by much legislation is that the variance can be granted upon a showing of "practical difficulty and unnecessary (or undue) hardship," and such language has almost universally been held to be a sufficiently definite guideline.[169] Much modern legislation, however, goes beyond those broad terms and specifies standards with somewhat more particularity; generally, these standards include some or all of four possible factors: (1) the grant will not be injurious to the general welfare of the community or interfere with the overall comprehensive plan; (2) the grant will not be substantially detrimental to nearby property owners; (3) the need for the variance arises from some conditions peculiar to the specific land involved, not because of general conditions in the region or neighborhood; and (4) literal application of the ordinance would create "unnecessary," "undue," or "unusual" hardship for the owner of the property as to which the variance is sought.[170]

Some jurisdictions have statutes requiring that any local government wishing to exercise zoning power have a board of adjustment. See Town of Wellston v. Wallace, 152 P.3d 284 (Okla. Civ. App. 2006) (municipality must have both a zoning commission and a board of adjustment in order to exercise zoning authority).

For critical assessments of the work of zoning boards of adjustment, see Dukeminier & Stapleton, The Zoning Board of Adjustment: A Case Study in Misrule, 50 Ky. L.J. 273 (1962); Note, Board of Zoning Appeals Procedure: Informality Breeds Contempt, 16 Syracuse L.Rev. 568 (1965). On the appealing of zoning decisions of boards of adjustment, and challenges to zoning decisions of local legislative bodies, see generally Note, Trial Practice: Procedure for Appealing Decisions of a Municipal Zoning Agency, 18 Okla.L.Rev. 111 (1965); Note, Exhaustion of Remedies in Zoning Cases, 1964 Wash.U.L.Q. 368 (complainant attacking specific zoning as applied to his property must exhaust the available administrative remedies before resorting to courts, but challenge to constitutionality of zoning ordinance in entirety may be made in courts without recourse to administrative remedies).

[168] See Sugar v. North Baltimore Methodist Protestant Church, *supra* note 167; Tighe v. Osborne, 149 Md. 349, 131 A. 801 (1925); Concordia Collegiate Institute v. Miller, 301 N.Y. 189, 93 N.E.2d 632 (1950); State ex rel. Selected Properties v. Gottfried, 163 Ohio St. 469, 127 N.E.2d 371 (1955); Root v. City of Erie, 180 Pa.Super. 38, 118 A.2d 297 (1955); Flynn v. Zoning Board of Review, 77 R.I. 118, 73 A.2d 808 (1950); Texas Consolidated Theatres v. Pittillo, 204 S.W.2d 396 (Tex.Civ.App.1947). See Note, Municipal Corporations—Excessive Delegation of Powers by Municipality to Board of Adjustment, 1 Baylor L.Rev. 228 (1948).

[169] See Appeal of Blackstone, 38 Del. 230, 190 A. 597 (1937); Freeman v. Board of Adjustment, 97 Mont. 342, 34 P.2d 534 (1934); City of Lincoln v. Foss, 119 Neb. 666, 230 N.W. 592 (1930); Sundeen v. Rogers, 83 N.H. 253, 141 A. 142 (1928); Sheldon v. Board of Appeals, 234 N.Y. 484, 138 N.E. 416 (1923); L & M Investment Co. v. Cutler, 125 Ohio St. 12, 180 N.E. 379 (1932); In re Dawson, 136 Okl. 113, 277 P. 226 (1928); Spencer-Sturla Co. v. City of Memphis, 155 Tenn. 70, 290 S.W. 608 (1927). But see Welton v. Hamilton, 344 Ill. 82, 176 N.E. 333 (1931) (law authorizing board of appeals to modify zoning ordinance in cases of practical difficulties or unnecessary hardship is unconstitutional delegation of legislative power). See generally Note, Zoning—Power of Board to Vary, 26 Ill. L.Rev. 575 (1932); Note, Discretionary Powers of Zoning Boards of Adjustment in Pennsylvania, 97 U.Pa.L.Rev. (1948).

It has been held that the phrases "unnecessary hardship" and "practical difficulties"—each of which is used in some of the relevant legislation—have the same meaning here. Snyder v. Waukesha County Zoning Board of Adjustment, 74 Wis.2d 468, 247 N.W.2d 98 (1976). See McKnight v. Mitchell, 144 Ga.App. 109, 240 S.E.2d 313 (1977) (owner entitled to variance when he shows practical difficulty or unnecessary hardship). See generally Note, Zoning Variances: The "Unnecessary Hardship" Rule, 8 Syracuse L.Rev. 85 (1956). But in some jurisdictions the terms "unnecessary hardship" and "practical difficulties" are differentiated, with the former—the more rigorous standard—applied to applications for *use* variances, and the latter—a more easily met requirement—applied to *area* variances. See Matthew v. Smith, 707 S.W.2d 411 (Mo.1986). As to the differences between use variances and area variances, see Pawn 1st, LLC v. City of Phoenix, 399 P. 3d 94 (Ariz. 2017) (setback requirement was area variance, not use variance; variance approved).

Even where the local legislative body itself determines whether or not a variance should be granted, it has been held that adequate standards must be provided by legislation. See City of Homestead v. Schild, 227 So.2d 540 (Fla.App.1969); Appeal of Clements, 2 Ohio App.2d 201, 207 N.E.2d 573 (1965).

[170] See, all applying criteria similar to those mentioned, Metropolitan Board of Zoning Appeals v. Rumple, 261 Ind. 214, 301 N.E.2d 359 (1973), applying Ind.Stat. Ann. § 18–7–2–71 and finding a denial of a

Some degree of financial detriment, it is often emphasized, does not by itself justify the grant of a variance,[171] but if a literal application of the law would mean that no economic or beneficial use of the property could reasonably be made, then a variance is justified.[172] A strong case for a variance may be presented if the particular property has peculiar physical characteristics, such as unusual subsoil conditions, an unusual shape or configuration (as with a triangular lot, as to which the usual setback restrictions might operate harshly), or an unusual physical feature such as a ravine; but even in these situations, the requirement that the conditions be unique to the specific property must be met.[173] It is generally agreed that the location of a property on or near the boundary-line of a zone does not in itself make out a case of "unnecessary or undue hardship," though it is one factor that may be weighed.[174] If, however, the property—particularly if having a rather small area—is bisected by zoning lines—so that, for instance, part is in an exclusively residential zone and part in a commercial zone—, a strong case for a variance is shown.[175] It is usually agreed that an "unnecessary"

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variance legal; Frank v. Russell, 160 Neb. 354, 70 N.W.2d 306 (1955); Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851 (1939), rearg. denied 282 N.Y. 681, 26 N.E.2d 811; Pelican Production Corp. v. Mize, 573 P.2d 703 (Okl.1977); Brown v. Fraser, 467 P.2d 464 (Okl.1970). Cf. Kohl v. Mayor & Council of Fair Lawn, 50 N.J. 268, 234 A.2d 385 (1967) (variances can be granted where there are special reasons and there won't be public detriment; applying statute, and upholding the statutory standard); Vinson v. Medley, 737 P.2d 932 (Okl.1987) (variance justified where there is otherwise some degree of interference with ordinary legal property rights from which hardship would arise, the hardship is peculiar to the landowner's situation, the degree of hardship imposed by the ordinance is not essential to carrying out its spirit, and substantial deprivation results to landowners). See generally Note, Hardship and the Granting of Zoning Variances, 89 Neb. L. Rev. 1171 (2011).

171 Baccante v. Zoning Board, 153 Conn. 44, 212 A.2d 411 (1965); Makar v. Zoning Board, 150 Conn. 391, 190 A.2d 45 (1963); Culinary Institute v. Board of Zoning Appeals, 143 Conn. 257, 121 A.2d 637 (1956); Piccirillo v. Board of Appeals, 139 Conn. 116, 90 A.2d 647 (1952); Marino v. City of Baltimore, 215 Md. 206, 137 A.2d 198 (1957) (pecuniary loss does not suffice; some arbitrary and capricious interference with property rights must be shown); Poster Advertising Co. v. Zoning Board of Adjustment, 408 Pa. 248, 182 A.2d 521 (1962) (fact that increase or decrease in property value will result from grant or refusal of variance does not show the required hardship); Spadaro v. Zoning Board of Adjustment, 394 Pa. 375, 147 A.2d 159 (1959) (economic hardship does not justify variance). Cf. Walker v. Board of County Commissioners, 208 Md. 72, 116 A.2d 393 (1955) cert. denied 350 U.S. 902, 76 S.Ct. 180, 100 L.Ed. 792 (variance won't be granted merely because property would then be more profitable); Blackman v. Board of Appeals, 334 Mass. 446, 136 N.E.2d 198 (1956) (variance cannot be granted solely on basis of economic hardship); Puritan-Greenfield Improvement Association v. Leo, 7 Mich.App. 659, 153 N.W.2d 162 (1967) (variance won't be granted just because applicant's property could then be more profitably used); Beirn v. Morris, 14 N.J. 529, 103 A.2d 361 (1954) (disadvantages to use of lot for purposes for which zoned were not peculiar to that lot; denial of variance affirmed).

172 Mischiara v. Board of Adjustment, 77 N.J.Super. 288, 186 A.2d 141 (1962) (sufficient ground if property cannot be put to any practical economic use unless variance granted); Burke v. Board of Adjustment, 52 N.J.Super. 498, 145 A.2d 790 (1958); Charles Land Co. v. Zoning Board, 99 R.I. 161, 206 A.2d 453 (1965) (variance should not be granted unless owner would otherwise be deprived of all beneficial use of property); Cole v. Zoning Board, 97 R.I. 220, 197 A.2d 166 (1964). Cf. Poster Advertising Co. v. Zoning Board of Adjustment, *supra* note 171 (reasons for granting variance must be substantial, serious, and compelling; economic hardship not sufficient in itself).

173 See Broadway, Laguna, Vallejo Association v. Board of Permit Appeals, 66 Cal.2d 767, 59 Cal.Rptr. 146, 427 P.2d 810 (1967) (subsoil conditions not a sufficiently "exceptional circumstance" to justify variance—profit motive not adequate ground for variance). If property is legally indistinguishable from surrounding lands, and is disadvantaged by zoning laws only to the same extent as other property in the area, a variance should not be granted. See Clark v. Board of Zoning Appeals, 301 N.Y. 86, 92 N.E.2d 903 (1950), motion denied 301 N.Y. 681, 95 N.E.2d 44, cert. denied 340 U.S. 933, 71 S.Ct. 498, 95 L.Ed. 673 (variance improperly granted to allow funeral parlor in residential zone); Jasy Corp. v. Board of Adjustment, 413 Pa. 563, 198 A.2d 854 (1964). For an argument that the "unique circumstances" requirement for variances should be more strictly applied by the courts, see Reynolds, The "Unique Circumstances" Rule in Zoning Variances—An Aid in Achieving Greater Prudence and Less Leniency, 31 Urban Law. 127 (1999).

174 Bellamy v. Board of Appeals, 32 Misc.2d 520, 223 N.Y.S.2d 1017 (1962) (property adjacent to area zoned for business; not a unique circumstance justifying a variance).

175 Or sometimes zoning that results in such a splitting of property may be ruled unreasonable and thus invalid. See generally Annot., Validity and Construction of Zoning Regulation Respecting Permissible

hardship will not be found where the detriment has occurred through the voluntary act of the owner of the property—as his own development of the land;[176] and this rule of "self-induced hardship" has often been applied to deny a variance to a person who purchased the property with actual or constructive knowledge of the zoning restrictions.[177] But it seems that the unique nature of the property and other general requirements for the variance may sometimes be met in situations where the present owner "purchased with knowledge," and the trend now is to hold that this situation is not necessarily one in which the variance should be denied.[178]

Power is often expressly given, or is readily inferred, for the administrative body that rules on variances to attach reasonable conditions to the granting thereof.[179] The

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Use as Affected by Division of Lot or Parcel by Zone Boundary Line, 58 A.L.R.3d 1241 (1974). See also Comment, Use District Boundary Lines, 17 Syracuse L.Rev. 714 (1966). On the need for reasonably definite boundary lines, see Annot., Validity of Zoning Regulations, with Respect to Uncertainty and Indefiniteness of District Boundary Lines, 39 A.L.R.2d 766 (1955).

[176] M. & R. Enterprises v. Town of Southington, 155 Conn. 280, 231 A.2d 272 (1967); Highland Park, Inc. v. Zoning Board of Appeals, 155 Conn. 40, 229 A.2d 356 (1967); Green v. City of Miami, 107 So.2d 390 (Fla.App.1958), cert. denied 114 So.2d 617; Salisbury Board of Zoning Appeals v. Bounds, 240 Md. 547, 214 A.2d 810 (1965); Deer-Glen Estates v. Board of Adjustment & Appeal, 39 N.J.Super. 380, 121 A.2d 26 (1956); Sherwood Realty Corp. v. Feriola, 193 Misc. 194, 82 N.Y.S.2d 505 (1948); Stratford Arms v. Zoning Board of Adjustment, 429 Pa. 132, 239 A.2d 325 (1968) (where hardship results from applicant's willful violation of zoning laws, variance cannot be granted). Cf. Banks v. City of Bethany, 541 P.2d 178 (Okl.1975) (hardship self-imposed where applicant needed to use additional area for display and storage of merchandise; also, condition creating hardship was not unique to his property); City of Pittsburgh v. Zoning Bd. of Adjustment, 522 Pa. 44, 559 A.2d 896 (1989) (hardship experienced by property owners as result of subdividing building into apartments in reliance on building permits was hardship of own making and didn't justify a variance where the building permits were based on false information provided by the property owners).

[177] See Minney v. City of Azusa, 164 Cal.App.2d 12, 330 P.2d 255 (Dist.Ct.1958), appeal dism'd 359 U.S. 436, 79 S.Ct. 941, 3 L.Ed.2d 932; Spalding v. Board of Zoning Appeals, 144 Conn. 719, 137 A.2d 755 (1957); Allstate Mortgage Corp. v. City of Miami Beach, 308 So.2d 629 (Fla.App.1975), cert. denied 317 So.2d 763 (Fla.1975) (applicant had purchased land that was already subject to set-back restriction); Elwyn v. City of Miami, 113 So.2d 849 (Fla.App. 1959), cert. denied 116 So.2d 773 (Fla.1959) (variance should not be granted for alleged "hardship" where owner had purchased property while it was in a certain zoning classification, and then applied for the variance); Podmers v. Village of Winfield, 39 Ill.App.3d 615, 350 N.E.2d 232 (1976) (property owner chargeable with knowledge of zoning restrictions when selling portion of tract); Clark v. Board of Zoning Appeals, 301 N.Y. 86, 92 N.E.2d 903 (1950), motion denied 301 N.Y. 681, 95 N.E.2d 44, cert. denied 340 U.S. 933, 71 S.Ct. 498, 95 L.Ed. 673 (applying the majority rule, denying a variance to a purchaser; this is sometimes called the "New York rule"); In re, McClure's Appeal, 415 Pa. 285, 203 A.2d 534 (1964). Cf. Richards v. Turner, 336 A.2d 581 (Del.Super.1975), aff'd 366 A.2d 833 (hardship self-inflicted where applicant could have avoided it by declining to exercise an option on the property). It has been suggested that a purchaser hopeful of using the property for a purpose forbidden by current zoning laws should condition the contract upon the securing of a use variance. See Salsbery v. District of Columbia Board of Zoning Adjustment, 357 A.2d 402 (D.C.App.1976). It seems that a variance may often be denied a "purchaser with knowledge" simply on the basis that variances are exceptional and somewhat discretionary, and one who purchased with knowledge usually does not have the equities on his side.

"Undue" or "unnecessary" hardship will not be found from the fact that applicant owned the property prior to the imposition of zoning restrictions, though this may qualify the owner for a non-conforming use. See Holman v. Board of Adjustment, 78 N.J.Super. 74, 187 A.2d 605 (1963).

[178] See Board of Adjustment v. Shanbour, 435 P.2d 569 (Okl.1967); Borough of Ingram v. Sinicrope, 8 Pa.Cmwlth. 448, 303 A.2d 855 (1973). The Oklahoma Supreme Court seemed about to overturn the *Shanbour* holding, *supra*, in Bailey v. Uhls, 43 Okl.B.A.J. 1337 (1972); but that opinion was vacated (42 Okl.B.A.J. 3285 (1972)), and the court ultimately affirmed a denial of variance on the grounds there was inadequate showing of unnecessary hardship and the board of adjustment's denial was not clearly against the weight of evidence. Bailey v. Uhls, 503 P.2d 877 (Okl.1972). See generally Reynolds, Self-Induced Hardship in Zoning Variances: Does a Purchaser Have No One But Himself to Blame?, 20 Urban Law. 1 (1988), stating that purchase-with-knowledge is not now, and should not be, grounds in itself for denial of a variance; since a variance will, once obtained, pass with the land, so should the right to obtain the variance.

[179] See Houdaille Construction Materials, Inc. v. Board of Adjustment, 92 N.J.Super. 293, 223 A.2d 210 (1966); Alperin v. Middletown Township, 91 N.J.Super. 190, 219 A.2d 628 (1966). Cf. Cornell Uniforms, Inc. v.

entire procedure for seeking variances is normally laid down by charter or ordinance, and generally now includes mandatory provisions for notice to neighboring owners or to the general public, plus some public hearing on the application.[180] Actions taken on applications for variances can be challenged in the courts, but this possibility contains two limitations: (1) The grant of a variance can only be challenged by a person showing peculiar damage therefrom—for instance, a neighbor who will be bothered by the noise resulting from the specially allowed use. The protesting person must show harm that is different-in-kind from that suffered by the general community.[181] (2) Neither the grant nor denial of a variance will be overturned by the courts unless the action is shown to be clearly unreasonable, arbitrary, or an abuse of discretion, as where clearly against the weight of the evidence.[182] In recent years, courts often emphasize that the power to grant

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Township of Abington, 8 Pa.Cmwlth. 317, 301 A.2d 113 (1973) (local governing body can condition grant of variance).

[180] See Aurora v. Zoning Board of Appeals, 153 Conn. 623, 220 A.2d 277 (1966); Winslow v. Zoning Board, 143 Conn. 381, 122 A.2d 789 (1956); Walker v. Board of County Commissioners, 208 Md. 72, 116 A.2d 393 (1955); Radick v. Zoning Board, 83 R.I. 392, 117 A.2d 84 (1955). Cf. Slagle v. Zoning Board, 144 Conn. 690, 137 A.2d 542 (1957) (81-hours' notice of hearing held inadequate). But there are two qualifications as to notice requirements: (1) It has been held that, where *not* provided by legislation, no right to notice exists in neighboring property owners. Nagel v. Kummerow, 51 Misc.2d 659, 273 N.Y.S.2d 726 (1966). (2) Where notice is ordinarily required as to a hearing, it may be held that lack of such notice is waived by objectors who personally appear at the hearing. See Phil Anthony Homes, Inc. v. City of Anaheim, 175 Cal.App.2d 268, 346 P.2d 231 (Dist.Ct.1959). But see Slagle v. Zoning Board, *supra* (objectors who appeared at meeting not estopped to deny inadequacy of notice). It would seem the objectors should still be allowed to protest the inadequacy of notice where they can reasonably allege they weren't given adequate time to *prepare* for the meeting.

[181] Marquis Who's Who, Inc. v. Ohio-St. Clair Garage Corp., 95 Ill.App.2d 73, 238 N.E.2d 74 (1968); Kennerly v. Mayor & City of Baltimore, 247 Md. 601, 233 A.2d 800 (1967); Stickelber v. Board of Zoning Adjustment, 442 S.W.2d 134 (Mo.App.1969). See Hawkins v. Bonneville County Bd. of Comm'rs, 151 Idaho 228, 254 P.3d 1224 (2011) (neighbor had standing to petition for judicial review of order granting property owners variances to build houses on agricultural land). Statutes or ordinances often now specify that persons "aggrieved" or "substantially affected" may attack the grant of a variance; but these provisions are usually interpreted as also requiring a showing of special injury. See Mabank Corp. v. Board of Zoning Appeals, 143 Conn. 132, 120 A.2d 149 (1956); Scott v. Board of Adjustment, 405 S.W.2d 55 (Tex.1966). Cf. Victoria Corp. v. Atlanta Merchandise Mart, 101 Ga.App. 163, 112 S.E.2d 793 (1960), interpreting statute requiring that protestant have "substantial interest." See generally Foss, Interested Third Parties in Zoning, 12 U.Fla.L.Rev. 16, 35 (1959).

[182] Ames v. City of Pasadena, 167 Cal.App.2d 510, 334 P.2d 653 (Dist.Ct.1959); San Diego County v. McClurken, 37 Cal.2d 683, 234 P.2d 972 (1951); Bailey v. Uhls, *supra* note 178; In re Upper St. Clair Township Grange, 397 Pa. 67, 152 A.2d 768 (1959); O'Neill v. City of Philadelphia, 384 Pa. 379, 120 A.2d 901 (1956); Tripp v. Zoning Board, 84 R.I. 262, 123 A.2d 144 (1956). Where the variance has been denied, courts have the power to order it awarded. See City of Baltimore v. Sapero, 230 Md. 291, 186 A.2d 884 (1962); Beardsley v. Evangelical Lutheran Bethlehem Church, 261 Mich. 458, 246 N.W. 180 (1933); Jersey Triangle Corp. v. Board of Adjustment, 127 N.J.L. 194, 21 A.2d 845 (1941); Application of Shadid, 205 Okl. 462, 238 P.2d 794 (1951); In re Blanarik, 375 Pa. 209, 100 A.2d 58 (1953); Morin v. Zoning Board, 89 R.I. 406, 153 A.2d 149 (1959). But a denial will generally be reversed only upon *extremely* strong proof of abuse of discretion. See Coleman v. Board of Appeal, 281 Mass. 112, 183 N.E. 166 (1932); Hickox v. Griffin, 298 N.Y. 365, 83 N.E.2d 836 (1949); Appeal of Kerr, 294 Pa. 246, 144 A. 81 (1928); Denelle v. Zoning Board, 89 R.I. 456, 153 A.2d 143 (1959). Compare Lindy's Restaurant, Inc. v. Zoning Board of Appeals, 143 Conn. 620, 124 A.2d 918 (1956) (power to grant variance must be sparingly exercised; grant of variance merely on basis of financial hardship will be overturned). In Shelton v. City of College Station, 780 F.2d 475 (5th Cir. 1986) (en banc), cert. denied 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1986), the court went even farther than usual in deferring to the judgment of the zoning board of adjustment, holding that variance decisions are quasi-legislative and thus reviewable only for arbitrary and capricious action.

It has been held that where a board of adjustment's decision on a variance is overturned by the trial court, the presumption initially attaching to the correctness of the board ruling is to be regarded as having been overcome by the trial court's decision. Red Dog Saloon v. Board of Adjustment, 791 P.2d 112 (Okl. App. 1989) (denial of variance had been reversed by trial court). As to who may appeal the granting of a variance, see Hacker v. Sedgwick County, 286 P.3d 222 (Kan. App. 2012) (zoning statute allowed appeal by "any person aggrieved" by a final decision of a city or county; held to cover neighbors dissatisfied by grant of variance).

variances should be sparingly exercised, as otherwise there is danger of gradual erosion of the comprehensive plan that should be the basis of any orderly pattern of zoning.[183]

"Special (or conditional) use permits" are similar to exceptions in that the authority for granting them is spelled-out in legislation: state statutes, home-rule charters, or the zoning ordinances; and no undue hardship need be shown in order for them to be granted. Again, the granting or denial is left to some administrative body, which must be given reasonably definite guidelines to control its exercise of judgment.[184] But the special or conditional use, almost by definition, always requires the obtaining of a special permit, to which reasonable conditions can be attached; and there is often less right to such permit than there is to an exception: The empowered authority can consider the possible detrimental effects on the neighborhood and community, the need for the proposed use in the area, the possible existence of an adequate number of other such

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[183] See Celentano, Inc. v. Board of Zoning Appeals, 149 Conn. 671, 184 A.2d 49 (1962); Wil-Nor Corp. v. Zoning Board of Appeals, 146 Conn. 27, 147 A.2d 197 (1958) (power should be sparingly exercised); Carney v. City of Baltimore, 201 Md. 130, 93 A.2d 74 (1952); Kohl v. Mayor & Council of Fair Lawn, 50 N.J. 268, 234 A.2d 385 (1967) (variances tend to impair sound zoning); In re Riccardi's Appeal, 393 Pa. 337, 142 A.2d 289 (1958); Bliss v. City of Fort Worth, 288 S.W.2d 558 (Tex.Civ.App.1956), ref'd n. r. e. Cf. Blackman v. Board of Appeals, 334 Mass. 446, 136 N.E.2d 198 (1956) (district has to end somewhere, and boundaries should not be pared down by granting of variances). Thus, it is sometimes stressed that *exceptional* circumstances must exist for a variance to be justified. See Hasage v. Philadelphia Zoning Board, 415 Pa. 31, 202 A.2d 61 (1964). This attitude no doubt helps explain the extreme deference given by courts to *denials* by local zoning bodies of variances, as discussed note 182 *supra*. See Cummins v. Board of Adjustment, 39 N.J.Super. 452, 121 A.2d 405 (1956) (more is to be feared from grants of variances than from denials). See generally Annot., Requirement that Zoning Variances or Exceptions Be Made in Accordance with Comprehensive Plan, 40 A.L.R.3d 372 (1971) (is need to develop standards that courts could use to determine whether particular variance, or other change, conforms to comprehensive plan of community). See also Owens, The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool, 29 Columbia J. Envtl. L. 279 (2004). As to whether the legal standards for granting or denying variances are really used in practice, see Sampson, Theory and Practice in the Granting of Dimensional Land Use Variances: Is the Legal Standard Conscientiously Applied, Consciously Ignored, or Something in Between?, 39 Urban Law. 877 (2007), examining the decisions of the variance-granting boards of three Denver-area municipalities as to applications for "area" or "dimensional" (as opposed to "use") variances.

[184] See Schultz v. Board of Adjustment, 258 Iowa 804, 139 N.W.2d 448 (1966). But see State ex rel. Standard Mining & Development Corp. v. City of Auburn, 82 Wash.2d 321, 510 P.2d 647 (1973) (standards need not be legislatively set for imposing the *conditions* under which special use permit will be issued). Special or conditional uses are often provided because it is thought this device introduces a needed element of flexibility into zoning plans. See State ex rel. Skelly Oil Co. v. Delafield, 58 Wis.2d 695, 207 N.W.2d 585 (1973). But the flexibility should not be allowed to go too far; thus, one court found that where an entire township was zoned for agricultural and residential uses, with other uses allowed only upon obtaining a special permit, this was the antithesis of zoning and was invalid. Rockhill v. Township of Chesterfield, 23 N.J. 117, 128 A.2d 473 (1957). This desire for flexibility may, however, help justify greater delegations of authority to administrative bodies or exercises of broad power by legislative bodies—as to what conditions to attach, exactly how to frame the permit, etc.—than could be justified where exceptions or variances are concerned. See Bollinger v. Board of Supervisors, 217 Va. 185, 227 S.E.2d 682 (1976) (local governing body may reserve right to issue special use permits without specifying standards for issuance in ordinance); Gerla v. City of Tacoma, 12 Wash.App. 883, 533 P.2d 416 (1975), review denied 85 Wash.2d 1011 (1975) (local governments have inherent power to impose reasonable conditions on special use permit even though such conditions not guided by specific standards); State ex rel. Standard Mining & Development Corp. v. City of Auburn, *supra*.

Special use permits may be required as to certain uses which are considered undesirable and which it is therefore thought should be allowed only under unusual circumstances. See Arizona Public Service Co. v. Town of Paradise Valley, 125 Ariz. 447, 610 P.2d 449 (1980) (utility poles and wires had to be placed underground unless special permit obtained; ordinance upheld, court noting that town, as part of its zoning powers, could require undergrounding of all utility wires, etc.). Cf. Alaska R.R. v. Native Village of Eklutna, 43 P.3d 588 (Alaska 2002) (conditional use is a use that is generally inappropriate for area in which it is situated but that is permitted after additional controls and safeguards are instituted to ensure its compatibility with permitted principal uses). In general, special use permits and conditional permits are "essentially one and the same." See Gardiner v. Boundary County Bd. of Comm'rs, 148 Idaho 764, 229 P.3d 369, 372 (2010) (interpreting Idaho statutes).

uses, and various factors connected with the public welfare.[185] The grant or denial will, as with the variance, be overturned by the courts only if clearly arbitrary or capricious action is shown.[186] This procedure is often used where some uses other than those for

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[185] See Kotrich v. County of Du Page, 19 Ill.2d 181, 166 N.E.2d 601 (1960), appeal dism'd 364 U.S. 475, 81 S.Ct. 243, 5 L.Ed.2d 221, reh. denied 365 U.S. 805, 81 S.Ct. 466, 5 L.Ed.2d 463 (special or conditional zoning utilized for infrequent types of land use which are sometimes necessary and desirable); S. Volpe & Co. v. Board of Appeals, 4 Mass.App. 357, 348 N.E.2d 807 (1976) (zoning board has considerable discretion to deny special use permit where would be injurious to neighborhood or community); Anderson v. Peden, 284 Or. 313, 587 P.2d 59 (1978) (landowner not entitled as a matter of right to special permit for mobile home); Christian Retreat Center v. Board of County Commissioners, 28 Or.App. 673, 560 P.2d 1100 (1977) (conditional use permit could be denied where granting it would result in increased congestion and noise in area). Cf. Marcia T. Turner, L.L.C. v. City of Twin Falls, 144 Idaho 203, 159 P.3d 840 (2007) (council could deny application for special use permit for television transmission tower even if nobody testified against application at public hearing and could consider aesthetics when making its decision). See generally Manly v. City of Shawnee, 287 Kan. 63, 194 P.3d 1 (2008), upholding a city's grant of a special use permit for an illuminated softball complex and stadium; listing 8 factors to be considered by governing bodies in zoning matters. But in some jurisdictions, a special or conditional use permit is similar to an exception: a right to the use may be found to exist if the required standards are met. See Hay v. Township of Grow, 296 Minn. 1, 206 N.W.2d 19 (1973) (where ordinance specifies standards for permit and applicant fully complies, denial of permit is arbitrary as a matter of law).

In *all* jurisdictions, it is generally agreed that a denial of a permit *can* be overturned, at least where the denial is found arbitrary and unreasonable. See Pioneer Trust & Savings Bank v. County of McHenry, 41 Ill.2d 77, 241 N.E.2d 454 (1968); Cove Pizza, Inc. v. Hirshon, 61 A.D.2d 210, 401 N.Y.S.2d 838 (1978). Cf. Taylor v. County of Peoria, 30 Ill.App.3d 685, 333 N.E.2d 726 (1975) (fear of overcrowding of schools was not sufficient reason to deny permit to mobile home park); LaSalle National Bank v. County of Lake, 27 Ill.App.3d 10, 325 N.E.2d 105 (1975) (denial of special use permit for a planned unit development—variety of housing, commercial area, etc.—was unreasonable where developer had substantially met all requirements). Compare Uintah Mt. RTC, L.L.C. v. Duchesne County, 2005 UT App 565, 127 P.3d 1270 (2005) (denial of conditional use permit is arbitrary only if it is not supported by substantial evidence; denial here was not so supported and thus is overturned); Mustang Run Wind Project, LLC v. Osage County Bd. of Adjustment, 387 P.3d 333 (Okla. 2016) (zoning laws, including both granting and denial of conditional use permits, may not be imposed in arbitrary and capricious manner). Cf. Laughter v. Board of County Comm'rs for Sweetwater County, 2005 WY 54, 110 P.3d 875 (2005) (while discretion of officials may not be unbridled in deciding whether to issue conditional use permit, officials must be allowed to act with a certain amount of discretion, exercised reasonably, not arbitrarily or capriciously). See also cases cited note 186 *infra*. But the *issuance* of a special or conditional use permit creates vested property rights in the owner, particularly where relied on in the expenditure of money, and a permit cannot ordinarily be rescinded except as specifically provided by its terms. Schulman v. Fulton County, 249 Ga. 852, 295 S.E.2d 102 (1982) (permit for outdoor aerial lighting system). See generally Comment, When Conditions Go Bad: An Examination of the Problems Inherent in the Conditional Use Permitting System, 2014 BYU L. Rev. 1185. It has been observed that a municipal or county board of adjustment exercises quasi-judicial power when granting a conditional use permit. See Osage Nation v. Board of Comm'rs of Osage County, 394 P. 3d 1224, 1231 (Okla. 2017).

A special permit, once granted, ordinarily runs with the land. See County of Imperial v. McDougal, 19 Cal.3d 505, 138 Cal.Rptr. 472, 564 P.2d 14 (1977), application denied 434 U.S. 899, 98 S.Ct. 294, 54 L.Ed.2d 187.

[186] See Columbus Park Congregation of Jehovah's Witnesses v. City of Chicago, 25 Ill.2d 65, 182 N.E.2d 722 (1962) (denial must bear substantial relation to some police-power purpose). Cf. State ex rel. Rochester Association of Neighborhoods v. City of Rochester, 268 N.W.2d 885 (Minn.1978) (special use permit's grant or denial is subject to stricter judicial review than is amendment of zoning ordinance—which is a legislative act and must be upheld if supported by any rational basis). See also cases cited in 2d paragraph of note 185 *supra*. Compare Hargrave v. Tulsa Bd. of Adjustment, 55 P.3d 1088 (Okla. 2002) (district court has same power and authority as city board of adjustment to grant or deny a zoning variance or special permit). As to the relevance of neighborhood opposition in granting or denying a conditional use permit, see Note, Property Law: The Crossroads of Capacity and Livability: A Green Light to Neighborhood Opposition as a Factual Basis for Denying Conditional Use Permits, 42 Mitchell Hamline L. Rev. 320 (2016).

Conditions in a special permit, or an ordinance allowing such permits, are also presumed valid, but can be invalidated if shown unreasonable. See County of Cook v. Priester, 62 Ill.2d 357, 342 N.E.2d 41 (1976). Cf. J.L. Storedahl & Sons, Inc. v. Cowlitz County, 125 Wash.App. 1, 103 P.3d 802 (2004) (if conditions imposed are reasonably calculated to achieve protection of homeowners, public, and adjacent land, they cannot be set aside on appeal; conditions here imposed with issuance of special use permit for expansion of surface mine found reasonably calculated to achieve such protection).

If there is no legitimate reason for requiring a special permit for a particular use—as where, for instance, other similar uses are allowed without the need for such permit—a violation of Equal Protection may be found.

which an area is basically zoned are needed or desired in the vicinity—as some hospitals or medical facilities, or some schools, in a residential area.

What trends are apparent as to these qualifications—the exception, the variance, and the conditional use permit—on basic zoning patterns? (1) The overall trend since the 1920s has been toward more *ad hoc* zoning—*i.e.*, greater use of all these modifying devices. But in recent years, some courts and commentators have become increasingly concerned that the proliferation of these devices is resulting in less orderly, less comprehensive planning. Thus, some tightening of standards can be noted. (2) "Exceptions" and "conditional use permits" have moved closer together, as conditions are often now attached to exceptions, just as they always have been to conditional use permits, and as some courts even treat the use permits as being deserved as a matter of right where the prescribed conditions are met. In some jurisdictions, these two devices may now be virtually indistinguishable. (3) While amendments to zoning ordinances (being legislative in nature) won't be overturned unless no rational purpose is found, the granting or denial of an exception, variance, or use permit can be overturned if the decision is clearly against the weight of evidence—to such an extent as to be arbitrary or otherwise unreasonable. While in theory, the standard of review may be somewhat less stringent in the latter situations (*i.e.*, an overturning is easier to achieve), in practice the rules work out much the same. The review of *grants* of exceptions (and in some jurisdictions, conditional use permits) is qualified by the basic principle that there is a *right* to such relief upon the meeting of certain definitions or standards. And the review of *denials* of variances is qualified by the increasingly adverse attitude of courts toward variances—so that a denial will seldom be reversed.

See City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (requiring special use permit for group home for mentally retarded violated Equal Protection where no rational basis shown in the record for believing such a home would pose any special threat to city's legitimate interest, and requirement thus appeared to rest on irrational prejudice against the mentally retarded). Compare J.W. v. City of Tacoma, 720 F.2d 1126 (9th Cir.1983), where the court ruled that an ordinance requiring a special use permit for a group home for recently released mental patients was subject to "heightened scrutiny" and could be upheld only if it rationally furthered some substantial municipal goal; the ordinance in that case was found discriminatory and invalid. But "heightened scrutiny" was specifically rejected in *Cleburne*, *supra*, at 473 U.S. 441–46, 105 S.Ct. 3255–58. Cf. Baxter v. Belleville, Illinois, 720 F.Supp. 720 (S.D.Ill.1989) (injunction issued restraining city from refusing to allow special use permit for facility to care for persons in late stages of HIV); Love Church v. City of Evanston, 671 F.Supp. 515 (N.D.Ill.1987) (ordinance requiring churches to obtain special use permits involved classification based on religion since other similar uses, such as community centers and schools, did not need special permit; such classification permissible only if ordinance is narrowly tailored to serve a compelling governmental interest, which was not found here); Application of Volunteers of America, Inc., 749 P.2d 549 (Okl.1988) (special exception for prison prerelease center in commercial high intensity zone could not be denied merely because of fear, not necessarily having a basis in fact, of adverse effect on future development of area). See also Board of County Comm'rs of Leavenworth County v. Whitson, 281 Kan. 678, 132 P.3d 920 (2006) (statute prohibiting municipalities from requiring special use permits for group homes for disabled persons if such permits were not required for single-family residences within the same zoning classification did not apply to group homes for disabled, transitioning sexually violent predators). As to views regarding the *Cleburne* case, *supra*, and its results, see Comment, Conceptualizing *Cleburne*, 41 Golden Gate U.L. Rev. 121 (2010). Cf. Centro Familiar Cristiano Buenas Neuvas v. City of Yuma, 651 F.3d 1163 (9th Cir. 2011) (municipal ordinance that allows "religious organizations" to operate in an entertainment district only if they obtain a conditional use permit, but grants permits as of right for similarly situated secular groups, violates the "equal terms" provision of the Religious Land Use and Institutionalized Persons Act; see note 91, *supra*, and accompanying text). See generally Comment, Pathways From *Pacific Shores*: The Power of "Direct" Proof of Disparate Treatment in Group Home Litigation, 39 T. Jefferson L. Rev. 33 (2016). See also Connolly and Merriam, Planning and Zoning for Group Homes: Local Government Obligations and Liability Under the Fair Housing Act, 47 Urban Law. 225 (2015). Compare McGowan, Location, Location, Mis-Location: How Local Land Use Restrictions Are Dulling Halfway Housing's Criminal Rehabilitation Potential, 48 Urban Law. 329 (2016), discussing the *Cleburne* case, *supra*, at 354–56.